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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1009.

THE OGDENSBURG & LAKE CHAMPLAIN RAILROAD COMPANY, APPELLANT,

vs.

THE NASHUA & LOWELL RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE.

FILED OCTOBER 6, 1884.

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a Circuit Court of the United States, District of New Hampshire.
In Equity.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
NASHUA & LOWELL RAILROAD CORPORATION OF NEW HAMPSHIRE. } No. 165*a*.

Pleadings and Evidence.

b UNITED STATES OF AMERICA, *New Hampshire District*, } *ss:*

At a circuit court of the United States, for the first circuit, begun and holden at Portsmouth, within and for the district of New Hampshire, on the eighth day of May, in the year of our Lord one thousand eight hundred and eighty-four, before the honorable Horace Gray, associate justice.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY, Complainant,
v.
THE NASHUA AND LOWELL RAILROAD COMPANY OF NEW HAMPSHIRE *et al.*, Defendants.

The bill of complaint in this cause was filed in the clerk's office on the eighteenth day of June, A. D. 1880, and was duly entered at the October term of the court, A. D. 1880, and is in the words and figures following, namely:

1 *Bill of Complaint. Filed June* 18, 1880.

United States Circuit Court, District of New Hampshire. In Equity.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs
THE NASHUA & LOWELL RAILROAD CO. OF NEW HAMPSHIRE *et al.*

The Ogdensburgh and Lake Champlain Railroad Company, a corporation created and established in and by the State of New York and under the laws thereof, whose shareholders are citizens of said State, brings this its bill against the Nashua and Lowell Railroad Company of New Hampshire, a corporation created and established by the State of New Hampshire and under the laws thereof, whose shareholders are citizens of said State of New Hampshire, and against George Stark, of Nashua, in the State of New Hampshire, and a citizen of said State; and thereupon your orator complains and says:

First. That on the twenty-fourth day of February, 1871, an agreement in writing was made and executed by and between the Northern Transportation Company of Ohio, a corporation created by the State of Ohio and under the laws thereof, whose shareholders are citizens of said State, party of the first part; J. Gregory Smith, of St. Albans, in the State of Vermont, a citizen of said State, and the said George

Stark, parties of the second part; the said J. Gregory Smith and George Stark, as trustees and managers of the Vermont Central Railroad Company and of the Vermont and Canada Railroad Company, both which are corporations and were created by the State of Vermont and under the laws thereof, and the shareholders of each of which are citizens of said State of Vermont; the Northern Railroad
2 Company of New Hampshire, a corporation created by the State of New Hampshire and under the laws thereof, whose shareholders are citizens of said State; the said Nashua and Lowell Railroad Company of New Hampshire, and the Boston and Lowell Railroad Corporation, a corporation created by the State of Massachusetts and under the laws thereof, whose shareholders are citizens of said State of Massachusetts, parties of the third part; and your complainant, party of the fourth part; of which contract a copy is hereto annexed, marked "A," and made part of this bill.

Second. That said contract declared that the tracks of the several railroad companies, parties of the third and fourth parts, formed a large part of the connecting line between Boston, in said State of Massachusetts, and Ogdensburgh, in said State of New York, and that the said corporations respectively depended largely for their business upon the freight and passengers between said Ogdensburgh and the Western cities and towns upon the Great Lakes. That the party of the first part was chartered to carry on said business of transportation; that it was financially embarrassed and unable to carry on the same effectually, and that it was feared that its steamers would be taken off from said line of transportation; that it was for the interest of the parties of the third and fourth parts, severally, to advance and lend to the parties of the second part, as trustees, some portion of their several gross receipts from business brought to and from the said line of railroads for and during the term of nineteen years from the first day of March, 1871, to be by said parties of the second part, as trustees, expended and used to secure the ownership or the control of the stock of said party of the first part, and otherwise to secure the most efficient management of its business in order to carry out the purposes of said contract.

Third. That by said contract, said Transportation Company agreed to hold and purchase steamboats adequate to carry on successfully said business of transportation, to fix its rates of compensation for the same in a manner satisfactory to the parties of the third part, and as far as possible, during said term, to send all freight and passengers for points east of Ogdensburgh over the lines of the roads of the parties of the third and fourth parts. And the parties of the third part severally agree to reserve out of their respective
3 gross receipts over their respective lines for transportation of freight and passengers brought to said lines at Ogdensburgh, semi-annually, such portion of the sum of $150,000 as the separate gross earnings of each of them should bear to the aggregate gross receipts of all of them from said business, and to pay over the same to the said parties of the second part, trustees as aforesaid, to be by them used and employed for the purposes and in the manner hereinbefore set forth. And said party of the fourth part agreed, in case

it should be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburgh, to advance to said parties of the second part from time to time, when called upon by them, sums not, in all, to exceed $600,000, to be used by said parties of the second part for the same purposes as said semi-annual payments thus to be made by said parties of the third part, and to be *pro tanto* in lieu thereof, the same to be repaid out of said semi-annual reservation, as thereinafter provided.

Fourth. That by a subsequent provision of said contract it was agreed that in the event that the party of the fourth part (your complainant) should advance any sum or sums amounting to $600,000, or any part thereof, then the parties of the third part were to pay to your complainant so much of said semi-annual payments reserved from gross receipts, as aforesaid, as would pay the semi-annual interest on said sums so advanced at the rate of eight per cent. per annum; and further, that said parties of the third part should pay to the persons who may for the time being hold the offices of president and treasurer of the said Boston and Lowell Railroad Corporation and of your complainant, as trustee, such sums semi-annually as would, in the judgment from time to time of said two presidents and treasurers, when invested as a sinking fund, pay, first, all excess of the advances of your complainant which should exceed $500,000, within two years from the date of said contract, and as would also pay the remainder of the principal of said advances of your complainant on or before the expiration of said term of nineteen years. That said parties of the third part would also pay to said trustees such further sums semi-annually as would, when invested as a sinking fund, in the judgment of said trustees, purchase certain and all of the existing mortgages of said Transportation Company, amounting to $400,000, within ten years from the date of said contract.

4 The said semi-annual payments of interest thus to be made to the party of the fourth part by the parties of the third part, and the sums thus to be paid by said parties of the third part to said trustees of the sinking fund (instead of being paid to the parties of the second part), should be repaid to the parties of the third part out of the dividends, income, and securities purchased or acquired by the parties of the second part, as thereinbefore provided, and said parties of the third part thereupon severally agreed that the respective payments thus by them to be made to said sinking fund should in no event be less than amounts which, invested at six per cent. per annum, would produce the sums to be paid out of said sinking fund.

Fifth. That at the time of the execution and delivery of the contract aforesaid, the entire road of complainant and all its equipments and appurtenances had been, by a deed or contract bearing date the twenty-fourth day of February, 1870, leased and demised to the said Vermont and Canada Railroad Company and to the trustees and managers of the said Vermont Central Railroad Company, for the period of twenty years from and after the first day of March, 1870, and under and by reason of said lease your complainant had no in-

terest whatever in said contract, which fact was then and there well known to all the parties to said contract.

Sixth. That your complainant thereafterwards, upon the requisition of said party of the second part to said agreement, in conformity to the terms thereof, and for the purposes therein set forth, did, on the seventh day of October, 1871, pay to said party of the second part the sum of $600,000, which said payment, to the extent thereof, was in relief or in lieu of the semi-annual payments so to be made by said parties of the third part to said parties of the second part; and thereafterwards the two presidents and treasurers of the said Boston and Lowell Railroad Corporation, and of the complainant, did, upon consultation, fix and determine the amount of the several payments necessary to be made by the parties of the third part to the said trustees, in order to create a sinking fund sufficient and necessary for the purposes set forth in said agreement, and did notify the several parties of the third part of the amount thus fixed and to be paid; and said parties of the third part did thereafter severally, up to and including the month of August, 1874, each in the proportion that its gross earnings aforesaid bore to the aggregate gross earnings of all the said parties of the third part, pay to the said trustees as aforesaid, from time to time, an amount equal in the aggregate to the sum thus fixed and defined by said trustees; but since the month of September, 1874, neither of the said parties of the third part have made any payments whatever to said trustees towards such sinking fund, but have declined and refused so to do; and from out the amounts which were thus paid by said parties of the third part, up to and including the period aforesaid, towards such sinking fund, there has been reimbursed and paid to your complainant the sum of $100,000, part of the sum of $600,000 thus advanced by it, and a further sum of $108,000, leaving unpaid of its said advances the sum of $392,000, which is still due to your complainant, with interest.

Seventh. That on or about the fifteenth day of January, 1875, the said Transportation Company became embarrassed, and by virtue of certain proceedings in a court of law or equity its property, including all its steamers employed in transportation under said contract, was taken from its possession and control and placed in the hands of a receiver appointed by said court, by whom the same continued to be employed and used in said services of transportation to and from said lines of railroads of the parties of the third and fourth parts, upon the same terms and in the same manner as provided by said contract, until on or about the first day of February, 1876, when said steamboats and said property of said Transportation Company were, by order of said court, sold, disposed of, and delivered to other parties, and were no longer continued in said service of transportation.

Eighth. That upon a rendering of a true account by said defendant corporation of its gross earnings from said traffic up to the period when said boats and property of said Transportation Company were so sold, compared with the amount of the gross earnings therefrom by all said parties of the third part, it will appear that the

gross earnings of the defendant corporation were not less than the one-fourth part of the whole of said gross earnings.

Ninth. That by reason of the premises your complainant is in equity entitled to recover against the defendant corporation
6 such proportion of its said advances to said party of the second part as remain unpaid as aforesaid, as the amount of said defendant corporation's gross earnings up to the period when the property of said Transportation Company was sold and disposed of bore to the gross earnings of all the parties of the third part to said contract, with interest thereon, at the rate of eight per cent. per annum. And your complainant has requested the defendant corporation to account with and pay over such sum as may be found due to complainant as aforesaid.

And your complainant well hoped that said defendant corporation would have complied with the reasonable request of your complainant, as in justice and equity it ought to have done.

But now, so it is, may it please your honors, that said defendant corporation refuses to comply with said reasonable request. All of which said actings and doings of said defendant corporation are contrary to equity and good conscience, and tend to the manifest wrong and injury of your complainant.

In consideration whereof, and forasmuch as your complainant is remediless by the strict rules of the common law, and is relievable only in a court of equity, where matters of this sort are properly and cognizably relievable; to the end, therefore, that the said defendant corporation and said Stark may answer the premises, and that, under the direction and decree of this honorable court, an account may be taken of the semi-annual amounts of gross receipts of said defendant corporation as described in said contract from said first day of March, 1871, down to the period aforesaid, when the boats and property of said Transportation Company were sold and disposed of; and that said defendant corporation may set forth a list or schedule and description of all books, accounts, or other writings which may be or may have been in its possession or power, which show or tend to show the amounts of its said gross receipts, and that said defendant corporation set forth a true account thereof; and that the said defendant corporation be decreed to pay your complainant such portion of said sum so remaining due to your complainant by reason of its said advances, with interest as aforesaid, as its gross receipts bear to the aggregate gross receipts of said parties of the third part, and that your complainant may have such other and
7 further relief in the premises as the nature and circumstances of this case may require—

May it please your honors to grant unto your complainant a writ of subpœna, directed to said defendant corporation and to said Stark, commanding them to appear, and full, true, and perfect answer make to all and singular the premises; and further, to stand to,

perform, and abide such further direction and decree as shall seem agreeable to equity and good conscience.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD CO.,
By its Solicitor, WALLACE HACKETT.

S. BARTLETT,
Of Counsel for Complainant.

A.

Articles of agreement between the Northern Transportation Company of Ohio, a corporation established under the laws of Ohio, party of the first part; J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, parties of the second part; and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, the Northern Railroad of New Hampshire (the Concord Railroad Corporation of New Hampshire, provided they execute this agreement), the Nashua and Lowell Railroad Corporation of New Hamphire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, parties of the third part; and the Ogdensburgh and Lake Champlain Railroad Company, the party of the fourth part.

Whereas the above-named railroad companies and trustees and managers which have become parties to agreements hereto annexed, bearing date the twenty-fourth day of February, A. D. 1870, and whose tracks forms a large part of the connecting line between Boston, in Massachusetts, and Ogdensburgh, in New York, depend largely for their business upon the regular transportation by steamers of freight and passengers between said Ogdensburgh and the Western cities and towns upon the Great Lakes; and whereas the party of the first part was chartered to carry on the business of such transportation, but by reason of financial embarrassments is
8 unable to carry it on efficiently, and it is feared that its steamers may be taken from this line; and whereas the parties of the third part and the party of the fourth part believe it to be for their and the public interest to advance or lend to the parties of the second part some portion of the gross receipts for the transportation of freight and passengers to be brought to and from their line by the steamers of the party of the first part, in order to secure the most regular, efficient, and permanent service by steamers between Ogdensburgh and said Western cities and towns for the term of nineteen years from the first day of March, A. D. 1871; and whereas the parties of the second part have agreed to use all sums advanced or lent to them to secure the ownership or the control of the stock of said party of the first part, and otherwise to secure the most efficient management of its business to carry out the purposes of this agreement, and for no other purposes, and to hold all said stock which they may hold or control, and all other property or rights which they may purchase, or otherwise acquire with said funds, except debts due from said party of the first part, in trust to secure the re-

payment of all sums which may be so advanced or lent as aforesaid, with interest as hereinafter provided.

Now, therefore, in consideration of the premises, it is covenanted and agreed between said parties, as follows:

Article First.

That the party of the first part shall, during said term, continue to hold and own as many and as serviceable steamers as it now has, and will keep them properly equipped, seaworthy, and in good running order, and will make such addition to the number of said boats as the business shall require, and will run them for the transportation of freight and passengers between said Ogdensburgh and said Western cities and towns, at such time, and in such manner, and at such rate of freight and fare as shall be satisfactory to the executive committee of the parties of the third part for the time being, or if there be no such executive committee, or there is any legal impediment to their action, to the satisfaction of the presidents, for the time being, of the third and fourth parties, or a majority of them. And that the party of the first part will keep all other property owned by it in good repair and in serviceable condition, and that so far as may be practicable during said term, it will send all
9 freight and passengers for points east of Ogdensburgh over the lines of the roads of the parties of the third and fourth parts.

A schedule of said steamers and other property is hereto annexed.

Article Second.

That the parties of the third part will, during said term, semi-annually reserve out of the gross receipts, either upon said line, or upon any roads now leased or operated, or which may hereafter be leased or operated by the parties of the third part, or either of them, for the transportation of freight and passengers brought to said line at Ogdensburgh by the steamers of the party of the first part, the sum of one hundred and fifty thousand dollars, or so much thereof as shall be adequate for the purposes herein set forth, and pay over the same to the parties of the second part to be used for the purpose of securing regular, efficient, and adequate service to and from said Ogdensburgh as aforesaid, and the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburgh, when called upon by parties of the second part, advance, from time to time, sums not in all exceeding six hundred thousand dollars, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be *pro tanto* in lieu thereof, and to be repaid out of said semi-annual reservation, as hereinafter provided, it being understood and agreed that each of said parties of the third part shall only be liable to reserve and advance or pay to the parties of the second part, or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said

parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward, upon the roads owned, leased, or operated by any of said third parties.

Article Third.

That the parties of the second part shall hold all stock and rights to control stock of the party of the first part which they now have or shall purchase or acquire, and all other property or rights that may be purchased or otherwise acquired under this agreement, except debts due from the party of the first part as aforesaid, in
10 trust, to secure the repayment of all sums which the parties of the third and fourth parts, either or any of them, lend or advance under this agreement, and interest thereon at the rate of ten per cent. per annum, payable semi-annually, and shall apply all dividends which they shall receive on said stock and income from other property to repay the same, and in case said sums shall not all have been repaid with interest as aforesaid, on or before the expiration of said term, or at any time, in case of failure of the third parties, or either of them, to perform the stipulations of this agreement, then said parties of the second part shall, in case the parties hereto of the third and fourth parts shall not otherwise agree, sell said stock and other property at public auction in said Ogdensburgh, after advertising the same for at least thirty days in some newspaper published in said Ogdensburgh, and a newspaper published in said Boston, and divide the net proceeds among the parties entitled thereto, but any change may at any time, and from time to time be made in said trust funds by sale, purchase, or otherwise by said parties of the second part with the written consent of the presidents for the time being of the parties of the third and fourth parts.

That while the parties of the third part continue to pay the semi-annual interest to the party of the fourth part and the semi-annual payments to the trustees of the sinking fund as herein provided, the parties of the second part shall pay any dividends or income which they may receive to the parties of the third part, but in case of any default on the part of the parties of the third part said dividends and income shall be paid directly to said Ogdensburgh and Lake Champlain Railroad Company and to said trustees of said sinking fund in proportion to the amount of the semi-annual payments to them herein provided, and to be received by them *pro tanto* in place of said semi-annual payments.

Article Fourth.

That in case of vacancy in the number of the parties of the second part or their successors by death, resignation, or otherwise, the party of the second part or his successors continuing in the trust may fill the vacancy, subject, however, to the approval of the parties of the third and fourth parts, and that the parties of the second part or their successors are to assume no personal liability to repay the money advanced by the parties of the third and fourth parts,
11 but to apply the same according to the terms of this agreement, and to hold said stock, rights, and other property in

trust and apply the same and the dividends thereon and income thereof as aforesaid.

Article Fifth.

That in case the party of the fourth part shall advance any sum or sums amounting to six hundred thousand dollars, or any part thereof, under this agreement, then the parties of the third part are to pay to the party of the fourth part so much of said semi-annual payments reserved from gross receipts as aforesaid as will pay the semi-annual interest on said sum or sums so advanced by the party of the fourth part at the rate of eight per cent. per annum, and shall pay to the persons who may for the time being hold the offices of president and treasurer of the Boston and Lowell Railroad Corporation, and of the Ogdensburgh and Lake Champlain Railroad Company, as trustees, such sums semi-annually as will, in the judgment from time to time of said two presidents and treasurers for the time being, when invested as a sinking fund, pay all excess of the advances of the party of the fourth part over five hundred thousand dollars within two years from the date hereof, and the remainder of the principal of said advances on or before the expiration of said term of nineteen years, and also such further sum semi-annually as will, when invested as a sinking fund, in the judgment of said two presidents and treasurers as aforesaid, purchase the existing mortgage bonds of the party of the first part, amounting to four hundred thousand dollars, within ten years from the date hereof, which bonds so purchased shall be held by said trustees of the sinking fund for the security of the parties hereto, as if held under article seventh of this agreement, and that said semi-annual payments are to be made to the party of the fourth part and to said trustees of said sinking fund in place of advances to the same amounts to the parties of the second part, as hereinbefore provided, and are to be ultimately repaid to the parties of the third part out of the dividends, income, and securities purchased or otherwise acquired by the parties of the second part, as herein provided, whether the same shall be held by them or transferred to the trustees of said sinking fund. In no case shall payments to a sinking fund be less than amounts which invested at six per cent. per annum will produce the sum to be paid out of such sinking fund.

12 Article Sixth.

That if at the end of said term the sums advanced to the parties of the second part under this agreement shall not have been repaid to the parties of the third part, with interest, as hereinbefore provided from the dividends of the stock of the party of the first part, or otherwise, the party of the fourth part shall have the right, for six months after the expiration of said term, to purchase at the actual cost thereof from the parties of the third part one hundred and twenty-four hundred and fourth parts of the claim for said advances, and in any event shall have a like proportionate interest on the same terms under any new arrangement which may be made, and a like proportionate interest in the securities for said claim, or in securities,

property, or rights acquired under this agreement, on paying a like proportion of the cost thereof.

Article Seventh.

That it shall be the duty of the parties of the second part, if practicable, to procure an extension of the time of payment of the mortgage bonds of the party of the first part, which shall not have been purchased for the sinking fund for five years from the date of maturity; but if it shall be necessary in order to secure the running of said steamers as aforesaid for the parties of the second part to use any of the funds advanced to them as aforesaid to purchase or otherwise acquire any debts due from said party of the first part, whether secured by mortgage or not, said parties of the second part shall forthwith assign and transfer all said debts and all evidences thereof and all securities therefor to the persons who may for the time being be trustees of said sinking fund to be held by them in trust; first, to secure the repayment of all advances or loans made under this agreement by the party of the fourth part, and after the full payment of said advances or loans with interest as aforesaid to the party of the fourth part, to secure the repayment of all sums paid, advanced, or lent under this agreement by the parties of the third part, with interest as aforesaid, and that as long as the semi-annual payments of interest shall be duly made by the parties of the third part to the party of the fourth part, and the semi-annual payment to the sinking fund, as provided in the fifth article of this agreement, said trustees may extend by renewals or otherwise the payment of both the principal and interest of said debts of said
13 party of the first part at their discretion for a period not exceeding ten years from the date thereof, but in case of default by the parties of the third part, to make said payments of interest and to the sinking fund, as provided in article fifth, said trustees of said sinking fund shall forthwith, if requested, in writing, by the party of the fourth part, proceed to collect said debts, and out of the sums collected pay from time to time said semi-annual interest, as provided in article fifth, to the party of the fourth part, and hold the balance, if any, as a part of said sinking fund, and that all of said sinking fund shall finally, at the end of said term, be applied to pay all advances made by the party of the fourth part, and if any balance shall remain the same shall be divided among the parties of the third part in such proportions as they shall be entitled to, and if said sinking fund shall prove insufficient the parties of the third part shall make up the deficiency out of gross receipts from said business brought by steamers as aforesaid.

Article Eighth.

That the parties of the third part, in order to secure the payment to the party of the fourth part, and to the trustees of the sinking fund, of the amount agreed upon semi-annually as hereinbefore provided, will deposit with the manager of the Boston and Lowell Railroad Corporation at Boston, or the person for the time being performing the duties now performed by said manager, before the last

day of June and the last day of December of each year of said term, from funds in their hands received from freights and passengers brought to or carried from the line aforesaid by the party of the first part, the amount of the semi-annual payments to be made to the party of the fourth part and to the trustees of said sinking fund; and the party of the fourth part and said trustees are hereby authorized to draw the same, on the first days of each of the following months, on the manager or other person as aforesaid, who is hereby authorized to, and it is hereby agreed shall make the payments in this article provided for out of sums so deposited, or in case of failure to make such deposits out of and to the extent of any funds in the hands of said Boston and Lowell Railroad Corporation, collected in behalf of each of the parties of the third part from joint freight and passengers brought to and from the steamers of the party of the first part.

14 Article Ninth.

The trustees of said sinking fund shall invest the same, so far as shall be found to be reasonably practicable, in any mortgage bonds of the party of the first part, and in the bonds of the party of the fourth part which shall be issued after the date hereof, which last-mentioned bonds, when so purchased, shall be cancelled by said trustees of said sinking fund, and when so cancelled be delivered to the party of the fourth part, and the party of the fourth part shall give a receipt for the amount of the bonds so cancelled, and said receipt, filed with the trustees of said sinking fund, shall represent said sinking fund to the amount of the said cancelled bonds; and if any other investment of said sinking fund shall be made by said trustees special regard shall be had to the absolute safety of such investment.

The compensation of said trustees shall be fixed and paid by the parties of the third part, and said trustees shall annually make a written or printed report of their investments and doings to the parties of the third part and party of the fourth part, and such further special reports of said investments and doings as said parties of the third part and party of the fourth part, or either of them, may require.

In witness whereof the said corporations, parties to this agreement, have respectively caused their corporate seals to be hereto affixed, and their corporate presents to be signed.

Signed, executed, and delivered by their respective presidents hereunto duly authorized, and the said trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, and the said J. Gregory Smith and George Stark have hereunto set their hands and seals at Boston, in the Commonwealth of Massachusetts, this twenty-fourth day of February, A. D. eighteen hundred and seventy-one.

Signatures as below:

THE NORTHERN TRANSPORTATION COMPANY OF OHIO,

[SEAL.] By P. CHAMBERLAIN, *President.*

Witness to signature of P. Chamberlain:

E. D. CHILDS.

15 OGDENSBURGH & LAKE CHAMPLAIN
RAILROAD COMPANY,
[SEAL.] By JOHN C. PRATT, *President.*

Witness to signature of J. C. P.:
E. H. CHURCH.

THE NASHUA & LOWELL RAILROAD
CORPORATION,
By their committee thereto duly authorized—
F. B. CROWNINSHIELD,
[SEAL.] J. G. ABBOTT,
GEO. STARK,
Committee.

THE BOSTON AND LOWELL RAILROAD
CORPORATION,
By their committee thereto duly authorized—
F. B. CROWNINSHIELD,
[SEAL.] J. G. ABBOTT,
GEO. STARK,
Committee.

NORTHERN RAILROAD,
By ONSLOW STEARNS,
[SEAL.] CHARLES F. CHOATE,
Committee.

TRUSTEES AND MANAGERS VERMONT
CENTRAL, VERMONT AND CANADA
RAILROADS,
[SEAL.] By J. GREGORY SMITH.

[SEAL.] J. GREGORY SMITH,
[SEAL.] GEORGE STARK.

16 *Demurrer of the Nashua & Lowell Railroad Corporation to the Bill of Complaint of the Ogdensburg & Lake Champlain Company, Complainant.*

Circuit Court of the United States, District of New Hampshire.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL RAILROAD CO. OF NEW HAMPSHIRE *et al.*

The Nashua & Lowell Railroad Corporation, not confessing any or all of the matters in said bill of complaint contained to be true, as therein alleged, doth demur to said bill, and for cause of demurrer shows: that The Northern Railroad Company, a corporation established by law in the State of New Hampshire, and a citizen of said State, and the Boston & Lowell Railroad Corporation, J. Gregory Smith, of St. Albans, Vermont, and the trustees and managers in 1871 of the Vermont Central and Vermont and Canada railroad,

in the said bill of complaint or contract thereto annexed named or referred to, and proper and necessary parties to any suit brought against this defendant in this court touching any of the pretended matters of equity charged in said bill.

Wherefore this defendant demands the judgment of the court whether it shall be compelled to make any other or further answer to said bill, and prays to be hence dismissed with costs.

By its Solicitor, F. A. BROOKS.

I hereby certify that in my opinion the above-written demurrer is well founded in point of law.

F. A. BROOKS,
Of Counsel for Nashua & Lowell Railroad Company.

SEPT. 22D, 1880.

Then F. A. Brooks, as president of the Nashua & Lowell Railroad Corporation, defendant, and in its behalf, made solemn oath that the foregoing demurrer is not interposed for delay.

Before me, CHARLES W. CLIFFORD,
U. S. Commissioner.

17 Circuit Court of the United States, District of New Hampshire.

OGDENSBURGH & LAKE CHAMPLAIN R. R. Co.
v.
NASHUA & LOWELL R. R. Co.

Filed Feb. 24, 1881.

LOWELL, J.: The bill in this case is like that passed in Ogdensburgh & L. C. R. R. Co. *v.* Boston & Lowell R. R. Corporation, 4 Fell. Rep. 64, and has not been amended to meet the objections sustained in that case. The order must therefore be—

Demurrer sustained.

Circuit Court of the United States, District of New Hampshire. In Equity.

THE OGDENSBURGH & LAKE CHAMPLAIN R. R. Co.
vs.
THE NASHUA & LOWELL R. R. Co. OF NEW HAMPSHIRE. } No. 165*a*.

Filed March 9, 1881.

And now by leave of the court here the complainant amends his bill as follows:

First. By inserting on page five of said bill, at the end of the sixth paragraph or article thereof, after the words "with interest," the following words: "And your complainant avers that neither the said trustees of said sinking fund nor said Smith and Stark, parties of the second part to said contract, have now in their hands any sum of money whatever received by them under and in pursuance of said contract or any other thing of any character of any value

whatever applicable to the payment of your complainant's said advances.

18 Second. By inserting on page five of said bill, at the end of the eighth paragraph or article thereof, after the word "earnings," the following words: "And that the defendant has now in its hands thus derived by it from the said gross earnings a sum of money equal to one-fourth part of the amount thus remaining unpaid of your complainant's said advances."

Third. By inserting on page eight of said bill, in the ninth paragraph or article thereof, after the words "eight per cent. per annum," the following words "or if such be not the right of the complainant under the legal construction of said contract, then that your complainant is entitled to recover against said defendant out of the said gross earnings thus derived to in from said traffic, and now in its hands, one-fourth part of the amount of its said advances thus remaining unpaid to your complainant."

By WALLACE HACKETT,
Pl'ff- Solicitor.

Answer to the Nashua & Lowell R. Corporation to the Bill of Complaint of the Ogdensburgh & Lake Champlain R. R. Co. Filed April 22, 1881.

Circuit Court of the United States, District of New Hampshire.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL RAILROAD CORPORATION OF NEW HAMPSHIRE *et al.*

This defendant for answer to said bill, or to so much thereof as it is advised is material to be answered, says: It appears from said bill of complaint that several others besides the plaintiff and defendants are parties to the contract in said bill described, and jointly interested therein with this defendant, and are necessary parties

19 to the relief prayed for in and by said bill, viz: The Northern Railroad Company, a corporation created by the laws of New Hampshire, and a citizen of said State of New Hampshire; the Boston & Lowell Railroad Corporation, J. Gregory Smith, of Vermont, and the trustees and managers of the Vermont Central and Vermont & Canada railroads, consisting in 1871 of J. G. Smith and W. C. Smith, of St. Albans, Vt., and Lawrence Barnes, of Burlington, Vermont, and Benjamin P. Cheney, of Boston, Massachusetts, and this defendant does not waive this objection to said bill of complaint by stating the same in the form of an answer.

And this defendant admits that a contract in the terms recited in said bill was signed by F. B. Crowninshield, J. G. Abbott, and Geo. Stark, said Crowninshield, Abbott, and Stark claiming to be a committee duly authorized by this defendant corporation and by the Boston & Lowell Railroad Corporation to sign said contract.

But this defendant denies that any such committee was ever law-

fully appointed by it or was lawfully authorized by it to execute such contract, and requires strict proof thereof, if material.

And this defendant, reserving said objection and all other objections to the sufficiency of the plaintiff's bill of complaint, says it admits the execution of an agreement in writing annexed to said bill of complaint by copy and marked A, but denies that the same was executed at the time it bears date or for some time afterwards; and as to the meaning of said agreement this defendant refers to the language of the same as set forth in the copy marked A. As to the allegations in the 6th division of the plaintiff's bill of complaint this defendant says it is ignorant whether the presidents and treasurers of the plaintiff corporation and of the Boston & Lowell Railroad Corporation did fix and determine the amount of payments severally to be made by the parties of the third part, and did notify said parties of the third part thereof of the several sums to be paid by them respectively to the sinking fund; and this defendant is informed and believes that no such notice was ever received by it; and it requires the plaintiff to make strict proof of said allegations, if the same are material. And this defendant, further answering, says as to the 8th division or section of plaintiff's bill of complaint that it is not true that this defendant's gross receipts from the traffic referred to were as much as one-fourth part of the gross receipts of all said parties of the third part therefrom; and, from information and belief, this defendant says that its gross receipts from said traffic did not exceed one-fortieth part of the gross receipts therefrom of all said parties of the third part. But this defendant is wholly unable to render a correct statement or account of its gross receipts from said steamboats under said contract during the period in question or any part thereof; by reason of the fact that during the same period this defendant and the Boston & Lowell Railroad Corporation were, as to all the traffic of their two railroads, copartners under a certain joint traffic contract, so called, originally executed in 1857, under which contract all the receipts of both roads were pooled or commingled and kept as if they were receipts of a single railroad; and no separate account was kept as to the separate receipts of each railroad, so that it is now impossible for this defendant, or any other person or corporation, to render a separate and distinct account of its receipts from the business derived from the steamboats on the lakes referred to in plaintiff's bill; and for this reason, as well as for the reasons above stated, this defendant respectfully submits that the Boston & Lowell Railroad Corporation (one of said parties of the third part) is a necessary party to any suit brought by said plaintiff against this defendant; and this defendant further says that said plaintiff long since brought and is now prosecuting a suit against the Boston & Lowell Railroad Corporation for the same cause of action stated in its bill of complaint in this cause without making this defendant a party to said suit.

And this defendant is informed and believes, and therefore avers, that there was paid to the trustees of the said sinking fund in said bill of complaint mentioned by the Boston & Lowell Railroad Corporation, acting for itself and for this defendant, a much larger sum

than was due and owing from either or both of them to said sinking fund on account of gross receipts from business derived from boats of the Northern Transportation Co. at any time; and this defendant denies that any sum whatever is due and owing from it to the plaintiff under said contract if it shall receive the benefit of all sums contributed by its copartner, the Boston and Lowell Railroad Corporation, as aforesaid; and this defendant denies that it was ever notified that it was deficient in the payment of any particular sums which were payable to said sinking fund by it at any time,
21 and which had not been paid.

And this defendant, further answering, says that at the time of the execution of the contract in plaintiff's bill mentioned, the said J. Gregory Smith and George Stark were, and for some time previously had been, in the actual possession, control, and management (as an executive committee, so called, of the lessees) of the plaintiff's railroad under the lease thereof, dated February 24th, 1870, and referred to in the 5th section of the bill of complaint in this case; that said lease of February 24th, 1870, at the day of its date, had been assigned by the original lessees to the parties of the third part in contract A, annexed to plaintiff's bill of complaint, and by them again assigned to the lessor (the plaintiff in this case), by way of security for the payment of the rental provisions of said lease, and this defendant craves leave to refer to both said instruments bearing date February 24th, 1870.

And this defendant, further answering, shows that the contract A, annexed to plaintiff's bill of complaint, and the $600,000 dollars advanced by the plaintiff under the same, was made, and said money expended in the purchase of a majority of the capital stock of the Northern Transportation Co., then held and owned by one Philo Chamberlin, of Cleveland, Ohio, the president of said Northern Transportation Co., in pursuance of a written contract between the said Chamberlin and said Smith and Stark executed at the same time with contract A, and making part of the same transaction, and said contract with Chamberlin is annexed to this answer, as more fully appears by copy thereof, marked B.

And this defendant shows that by the terms of said contract, marked B, the said Smith and Stark undertook to purchase said capital stock of said Chamberlin, and to pay therefor to him, and before the first day of August, 1871, the sum of $418,000, without any funds in their hands for that purpose, and in reliance upon the agreement of the plaintiff to advance the same, and more for said purpose under the articles of agreement annexed to plaintiff's bill, marked A. And this defendant shows that the purchase of said capital stock of the Northern Transportation Co. and the agreement to make such purchase was an act wholly beyond its lawful authority to enter into or undertake, and this defendant is advised and believes that it was and is equally beyond the scope of its lawful authority to engage to reimburse the plaintiff for any part of the
22 amount, $600,000, loaned or advanced by the plaintiff to said Smith and Stark for the purpose of buying said capital stock; and this defendant is informed and believes that the plaintiff cor-

poration possessed no lawful capacity or power to make said purchase, either in its own behalf or in behalf of others, and therefore says that when the plaintiff confided the said sum of $600,000 to said Smith and Stark for the purchase of said capital stock, said plaintiff took the benefit only of such liability or contract for reimbursement, as the said Smith and Stark entered into by becoming parties of the second part to said contract marked A.

And this defendant, further answering, says that the said Smith and Stark remained in possession and control of the plaintiff's railroad for several years, and until the year when the plaintiff reclaimed possession of its said railroad, and entered into negotiations with the said Smith and Stark to obtain their consent to the return of said railroad to it, and thereupon the said Smith and Stark were induced to agree, and did agree, to deliver up its said railroad to the plaintiff corporation, and in part consideration therefor the said Smith and Stark obtained from the Ogdensburg railroad a large sum of money, and also obtained from the plaintiff an instrument in writing releasing and discharging the said Smith and Stark and the Vermont Central and Vermont & Canada railroads, and the trustees and managers of said railroads, from all claims under the contract annexed to plaintiff's bill, and the plaintiff likewise agreed to indemnify the said trustees and managers against all claims upon them in favor of this defendant and the other parties of the third part to said contract A; and by reason of such release and indemnity so given to the said Smith, Stark, and others, the plaintiff (as this defendant is advised and believes) has put it beyond its lawful power to hold this defendant accountable, as is attempted to be done in and by the bill of complaint in this case.

And this defendant prays that it may be hence dismissed with costs.

NASHUA & LOWELL RAILROAD CORPORATION,
By its President, F. A. BROOKS.

F. A. BROOKS, *Solicitor.*

23 EXHIBIT B.

Contract between Philo Chamberlain and Vermont Central Line.

March 1st, 1871.

This agreement, made this first day of March, 1871, by and between Philo Chamberlin, of Cleveland, in the county of Cuyahoga and State of Ohio, party of the first part, and J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, in their capacity as executive committee for the management of the Ogdensburgh and Lake Champlain railroad, in behalf of railroads extending from Rouse's Point to Boston, via Concord, New Hampshire, and Lowell, Massachusetts, known as the Vermont Central Line, contracting for and behalf of, and as trustees for said line, party of the second part, witnesseth:

Said party of the first part hereby agrees to sell and convey to

said second parties, in their capacity as aforesaid, and for the benefit of said line, five thousand five hundred shares of the capital stock of the Northern Transportation Company of Ohio, for the price of seventy-six dollars per share, and to apply the proceeds of such sale, as fast as the same shall be made to him, to the immediate payment of the debts and liabilities of said transportation company, so far as the same may be requisite to reduce such indebtedness and liabilities to the sum of four hundred thousand dollars, which sum of four hundred thousand dollars is to remain outstanding in the form of the now existing eight per cent. mortgage bonds of said Northern Transportation Company, having about five years to run, with interest on a portion of the same, paid to November 15th, 1870, and the remainder to January 15th, 1871.

The party of the first part further stipulates and agrees with the second party that upon the expiration of a reasonable time for the performance of the contract on his part, no other debts or liabilities of said Transportation Company shall remain outstanding, except said mortgage bonds, to the amount of four hundred thousand dollars as aforesaid, and except such debts and liabilities, not
24 exceeding in all the sum of one hundred thousand dollars, as are now existing and have been incurred for supplies now on hand, and salaries, insurance, and repairs for said Transportation Company since November 8th, 1870. Said bonds and debts which may remain outstanding as aforesaid are not to exceed in the aggregate the sum of five hundred thousand dollars, and are approximately scheduled as follows, as existing on the eighth day of November, 1870; but said sum of five hundred thousand dollars shall not include any indebtedness for supplies and the expense of operating said Northern Transportation Company subsequent to March 1st, 1860:

Hanover National Bank, New York	$15,000 00
First " "	24,000 00
Judson Bank, Ogdensburgh, New York	50,000 00
Commercial National Bank, Cleveland, Ohio	21,500 00
Merchants' " "	32,000 00
Savings Loan Association	20,000 00
First National Bank, Toledo, Ohio	10,400 00
Second " "	12,000 00
First " Detroit, Michigan	14,000 00
Bank in Akron, Ohio	15,000 00
Notes secured by mortgage on three boats	7,000 00
Notes secured by mortgage on real estate in Cleveland, Ohio	21,500 00
Sundry notes and accounts for supplies, fuel, and insurance	71,879 40
First mortgage bonds sold	95,500 00
	$409,779 40
Balance due P. Chamberlin up to March 1, 1871	64,000 00
Sundry accounts, about	30,000 00
	$503,881 71

Said party of the first — further agrees to remain in the service of said Northern Transportation Company, and efficiently devote his time, labor, and experience to the management thereof, and to the promotion of their interests, under the general control of the second party, for one year from the first day of January, 1871.

The second party, in consideration aforesaid, hereby stipulates and agrees to pay to said first party for said five thousand five hundred shares of stock of said Northern Transportation Company of Ohio at the rate of seventy-six dollars per share, amounting in the aggregate to the sum of four hundred and eighteen thousand dol-
25 lars. Payment shall be made as follows, in the manner hereinafter provided:

Fifty thousand dollars on the first day of March, 1871.
Fifty thousand dollars on the first day of April, 1871.
Fifty thousand dollars on the first day of May, 1871.
Fifty thousand dollars on the first day of June, 1871.
One hundred thousand dollars on the first of July, 1871.

And the balance of said four hundred and eighteen thousand dollars, viz., one hundred and eighteen thousand dollars, on the first day of August, 1871, with interest on said sum of four hundred and eighteen thousand dollars, at the rate of eight per cent. per annum, from the first day of February, 1871.

It is further mutually agreed that a majority of the shares (there being eighty-five hundred shares in all) of the entire capital stock of said Northern Transportation Company of Ohio shall, in anticipation of said payment as aforesaid, be deposited by the party of the first part with, and transferred to, Hon. A. B. James, of Ogdensburgh, or some other person to be mutually agreed upon, to be held by him as security for the mutual performance of the stipulations of this agreement, and that the balance of the said fifty-five hundred shares of the capital stock of said company shall also be deposited with, and transferred to, said James, or said other person to be agreed upon, to be also held by him as security as aforesaid, on or before the first day of August, 1871; and that the first party will, before April 1st, 1871, apply said first payment of fifty thousand dollars to the taking up or liquidation of indebtedness of said Northern Transportation Company, and deposit with and transfer to said James, or said other person, the notes, receipts, bonds, or other evidences of said indebtedness, so taken up or liquidated, to be also held by him as security for the mutual performance of the stipulations of this agreement; and that the subsequent payment herein provided for shall be made by said second parties to said James, or to said other person to be mutually agreed upon, to be paid by him to said first party, upon the condition that month by month said monthly payments shall be applied to the taking up and liquidation of the indebtedness of said Northern Transportation Company by said first party, and a deposit by him month by month of the notes, receipts, bonds, and other evidences of said indebtedness, so taken up and liquidated, to be also held by
26 said James, or said other person to be agreed upon, as security for the mutual performance of the stipulations of this

agreement; and upon the full peformance of the stipulations of this contract, by the parties respectively thereto, said James, or said other person, shall transfer to said second parties the stock of said company, and the receipts, notes, bonds, and other evidences of indebtedness, deposited as aforesaid, except such mortgage bonds of said company as, together with other outstanding mortgage bonds of said company, shall amount to the sum of four hundred thousand dollars, which are permitted by this agreement to remain outstanding; and also excepting such notes, receipts, and other evidences of indebtedness of said company, liquidated or taken up as aforesaid, by said first party, as relate to the payment of the indebtedness of said company over and above the amount now due for supplies, etc., and not exceeding one hundred thousand dollars in all, as before provided, and over and above the indebtedness of said company, incurred for its use and operation, subsequent to March first, 1871, as hereinbefore provided.

And said James, or said other person to be agreed upon, shall, upon the full performance of said party of the first part of his agreements as aforesaid, transfer to said first party all the other deposits then remaining in his hands, as herein provided; and said first party shall also deposit with said James or said other person, on or before the last day of July, 1871, satisfactory evidence that the stipulations and agreements, on the part of the first party, have been performed and complied with, and shall procure from said James, or said other person, a certificate that said stipulations and agreements have been complied with by said first party; whereupon, and on this condition, the last payment of the balance of said four hundred and eighteen thousand dollars on the first day of August, 1871, as aforesaid, shall be payable as before provided; and in case such certificate shall not be obtained as aforesaid, with said James, or said other person, shall be held by him in trust for said second parties, as security for the performance of the agreements herein contained of the first party.

The salary of said first party, for his services as aforesaid, shall be ten thousand dollars a year.

The compensation of Hon. A. B. James, or said other person to be agreed upon, as trustee, for the services to be by him per-
27 formed, as herein contemplated, shall be paid by the first and second parties, in equal parts.

It is further understood and agreed that the stipulations of this contract shall be only binding upon said Smith and Stark in their representative capacity as executive committee and trustees as aforesaid, and that they do not assume any personal liability therefor.

It is further stipulated and agreed that the one thousand shares of the stock of said Northern Transportation Company, now held as collateral by the Boston and Lowell, the Concord and Northern N. H. Railroad Companies or corporations, shall be counted and considered as a part of the amount required for a majority of the stock to be deposited with the trustee, and that the same are to be redeemed and deposited with the trustee on or before the first day of August, 1871, by said first party.

Signed, sealed, and delivered in duplicate, this first day of March, 1871.

(Sig.) PHILO CHAMBERLIN. [L. S.]

In presence of—
JOHN H GEORGE.
L. R. KIDDER.

J. GREGORY SMITH, [L. S.]
GEORGE STARK, [L. S.]
Executive Com.

[30-cent internal revenue stamp.]

Amendments to Plaintiff's Bill. Filed June 13, 1881.

DISTRICT OF NEW HAMPSHIRE:

THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
NASHAU & LOWELL RAILROAD COMPANY. } In Equity.

And now upon the coming in of the answer, plaintiff amends its bill as follows:

First. By inserting therein, at the end of the eighth paragraph, the words following:

"And your complainant further shows that said defendant
28 corporation sometimes pretends that at the time of the execution and delivery of said contract annexed to and forming part of said bill, there existed, and continued to exist, during the entire period for which plaintiff by its said bill seeks an account from the defendant of the gross proceeds of the traffic received by it in manner as aforesaid, a contract between defendant and said Boston and Lowell Railroad Company constituting both said corporations copartners, under which the gross proceeds of said traffic received by both said roads were pooled and combined as if they were the receipts of a single road, and that it is impossible for the defendant or any other person or corporation to render a separate and distinct account of said receipts by the defendant: whereas your complainant alleges the contrary to be the truth, and that such contract, if any there were, could not and did not create any such relation between the parties thereto, and that after the execution and delivery of the contract annexed to plaintiff's said bill the accounts of the gross earnings of each of said roads could not be kept (in reference to the terms of said contract), and were not in fact so kept, so that it is not in the power of the defendant to make the discovery required by said bill of the separate account of its gross earnings from said contract during the period therein described, and that this will appear when said alleged contract of said defendant with said Boston and Lowell Railroad Company, if any, shall be produced, and also when the accounts settled between said parties to said alleged contract between defendant and said Boston and Lowell Railroad Company, if any, shall be produced.

"And your complainant prays that said defendant may be required to produce and annex to its answer a true copy of any such contract between it and the said Boston and Lowell Railroad Company, and also true copies of all accounts in which the gross proceeds of such traffic were entered by the defendant, or any one in its behalf, and true copies of all accounts, if any, rendered or settled between the defendant and the said Boston and Lowell Railroad Company, embracing the gross proceeds of said traffic received by or on account of the defendant during the period set forth in said bill."

Second. By inserting on the seventh page of said bill, after the words "all and singular the premises," the following words:

29 "And the said defendant may true, direct, and perfect answers make to each of the interrogatories hereinafter set forth, that is to say:"

1. Upon and after the execution and delivery of the contract, copy of which is annexed to the bill of plaintiff, was there kept by you, or by any person or corporation, and who, an account embracing the gross proceeds of the freight or traffic received by your company or road in conformity to said contract; if so, will you produce and annex to your answer full and complete copies of all such accounts?

2. Whether or not were such accounts, or any account, embracing such gross proceeds, or any part thereof, rendered to you by any person or corporation by whom the same were kept; if so, please annex copies of all thereof to your answer?

3. Whether or not were any settlements at any time made by you with any person or corporation who kept any such account embracing said gross receipts; if so, at what dates? Please annex to your answer copies of all such settlements, and of each and every entry made on your books in reference to any such settlements?

4. Whether or not was any account kept, either by you or by any other person or corporation, showing, in conformity to the contract, copy of which is annexed to plaintiff's bill, what was at any time your contributive portion, based upon your gross earnings, toward the sum of $150,000 to be paid by the parties of the third part to said contract, as set forth in article 2 of said contract; if so, please annex to your answer copies of all such accounts in your possession or control?

5. If no accounts of the character mentioned in the last preceding interrogatory are in your possession or control, will you state how and in what manner your contributive portion, above referred to, was ascertained or fixed?

6. If there existed any contract between you, and any other person or corporation, under which any account was kept, or to be kept, of the gross proceeds received by you under and in carrying into effect said contract, copy of which is annexed to plaintiff's bill, will you annex to your answer copies of any such contract?

THE OGDENSBURGH & LAKE CHAMPLAIN RAILROAD CO.,
By S. BARTLETT, *its Solicitor.*

30 *Additional Answer of Nashua & Lowell R. Co., Def't. Filed June 13, 1881.*

U. S. Circuit Court, District of New Hamshire

THE OGDENSBURGH & LAKE CHAMPLAIN R. R. Co. }
vs. } In Equity.
THE NASHUA & LOWELL R. R. COMPANY *et als.* }

And now comes the Nashua & Lowell Railroad Corporation, after the filing by the complainant in said suit of certain amendments to the bill of complainant, with special interrogatories contained therein, and makes further or additional answer to said bill of complaint, as follows:

This defendant annexes hereto a copy of the contract entered into between it and the Boston & Lowell Railroad Corporation, and referred to in its previous answer as creating a partnership between said two corporations as to all traffic upon or over the roads of both corporations; said contract is marked "Exhibit B."

And in answer to the first interrogatory proposed by complainant this defendant says that no such account was kept by it, or by any one associated with or employed by it, or is now in its possession, and it does not know whether such account was kept by any other person or corporation. It cannot now produce any such account.

To the second interrogatory it says it is not aware that any such accounts were ever rendered to it by any one, and is not in possession of any.

To the 3d int. this defendant says it produces and annexes hereto an extract from its ledger, marked C, of entries supposed to relate to the inquiry. From these entries and those in the cash-book it appears that the item of $13,788.55 was for 31 0-0 of losses to July 1, 1873, on account Northern Transportation Co. business, as shown by the joint traffic books in possession of the Boston and Lowell R. R. Co., and that the item of $3,295.13 was 31 0-0 of the amount paid over by the joint roads to Oct. 1, 1874, to trustees of sinking
31 fund. In both cases these sums are equal to 31 0-0 of amounts paid out by the Boston & L. R. R. Co., as this defendant understands.

To the 4th int. this defendant says it has no knowledge of such account being kept by any one.

To the 5th int. this defendant says it has no knowledge on the subject.

To the 6th interrogatory it says it knows of no such contract.

And as a reason why this defendant cannot make any other or further answers to the interrogatories proposed to it, it says that, according to its information and belief, no account was ever kept by any one of the gross receipts of this corporation derived from traffic of the Northern Transportation Company since Oct. 1st, 1874, nor of the gross receipts of the Boston & Lowell Railroad Corporation derived from said traffic; but if such account was kept by any one it was kept by some others than this defendant or the Boston & Lowell Railroad Corporation, so that this defendant has no knowledge or

means of knowledge as to the amount of said gross receipts; this defendant is informed and believes that all payments or settlements ever made by it or by the Boston & Lowell Railroad Company under contract "A" were made directly to or with the Central Vermont Railroad Company, and not to or with the plaintiff; and this defendant says that all sums paid by — to the Central Vermont Railroad Company on such account were 31 per cent. of the amounts contributed by both this defendant and the Boston & Lowell Railroad Company, as copartners, as to all traffic, and had no reference to the gross receipts of this defendant under the terms of contract "A," based upon the gross receipts of said Northern Transportation Company's business.

And this defendant has never, to its present knowledge, received from the Boston & Lowell Railroad Company any other account or statement concerning sums payable by it under contract "A," except the statements contained in "Exhibit C" annexed; and this defendant believes that if any books of account now exist showing the contributory shares of the respective parties of third part in contract "A," such books of account are in the possession or control of the Central Vermont Railroad Company or the plaintiff; and this defendant says that since filing its former answer in this case it has been informed and now believes that the plaintiff did not pay the sum of $600,000 to said party of the second part in contract
32 "A," as is alleged in the 6th section of said bill of complaint, and denies that it did so, or that it paid over to said second party any more than the sum of $576,000, a sum less by $24,000 than the plaintiff claims to have paid over under said contract, by reason of which the payments actually made to said sinking fund by said third parties prior to October, 1874, were in excess of the amount properly payable by said third parties; and said third parties, and each of them, should now be allowed or credited for such excess in reduction of any sums now due, if any, and for interest on said sum of $24,000, so allowed or accounted for to plaintiff in excess of its lawful claim.

And this defendant, further answering, says it is advised and believes that whatever promise was made by the third parties in contract "A" directly to or for the benefit of the plaintiff was made by them jointly and not severally, except as to the sums payable by each, and that some of said parties of the third part, viz., the said trustees and managers of the Vermont Central Railroad and the said Smith, were released by the plaintiff from said contract, and from all liability thereunder, without reserving any claim against this defendant under said contract, and that such release operated in law as a release also of all claim then existing under said contract against this defendant, if any there was.

And this defendant denies that since October 1, 1874, and prior to commencement of this suit, any sum has been fixed or notified to this defendant as due or payable from it to the plaintiff under said contract "A" by any one authorized so to do.

And this defendant denies that any payments were ever made to the plaintiff by it under said contract "A" which were in propor-

tion to its gross receipts of business under said contract, or that any account was ever made up by it, or on its behalf, based upon the account of its gross receipts from said business as the rule for computation, or independently of the gross receipts therefrom of the Boston & Lowell Railroad Corporation.

And this defendant further says that it is advised and believes that no account can be taken for determining the liability, if any, of this defendant, which does not embrace a like account as to
33 the liability of all the other parties of the third part to said contract, and consequently all of said third parties must be made parties to said accounting, and without them as parties no accounting can be had, as the amount of the liabilities of each party (if any) can only be fixed after determining the amount of the liability (if any) of all said parties of the third part.

NASHUA & LOWELL RAILROAD CORPORATION,

[SEAL.] By its President, F. A. BROOKS.

EXHIBIT B.

Contract Between the Boston and Lowell and Nashua and Lowell Railroad Corporations.

Feb. 1st, 1857.

This indenture, made this twenty-ninth day of January, A. D. 1857, between the Boston & Lowell Railroad Corporation, a corporation duly established by the laws of the State of Massachusetts, of the first part, and the Nashua & Lowell Railroad Corporation, a corporation duly established by the laws of the States of Massachusetts and New Hampshire, of the second part, witnesseth:

That whereas a large portion of the business of the roads of the parties hereto is a joint business, passing over the roads and through the hands of both parties, making desirable a common policy and unanimity of management; and whereas in the transaction of said business there is a mutual interest in said parties, both as to the mode of transaction and as to the tariff upon the same, as well as in all other matters relating thereto; and whereas said corporations, by operating said roads in common management, would thereby be enabled to do the said business with greater facility, greater regularity, and at a great saving of expense to both parties: Now, therefore, for the promotion of their mutual interest through a
34 more efficient and economical joint operation and management of the said roads, and for the better security of their respective investments, as well as for the convenience and interest of the public, the said parties do hereby covenant and agree to and with each other that for the term of three years from and after the first day of February, A. D. 1857, the Boston & Lowell railroad and the Nashua & Lowell railroad, with their respective branches, shall be worked and managed as one road, under the stipulations and conditions and subject to the exceptions and limitations set forth in the following articles:

Article I.

Each party shall surrender to the joint management the entire control of their respective roads, shops, depots, furniture, machinery, tools, or other property necessary for the proper maintenance and working of the joint roads, reserving only to the separate management of each corporation such property as is hereinafter specified.

Article II.

The contracts now existing between the Nashua & Lowell Railroad Corporation and the Wilton Railroad Company and the Stony Brook Railroad Company, shall be assumed on behalf of the Nashua & Lowell Railroad Corporation, by the parties hereto jointly, and the income, expenses, and liabilities incident to the working of the same, shall be embraced in the current joint account of these parties; and the said Wilton railroad contract, which expires on the first day of April, A. D. 1858, may be renewed during the continuance of this agreement, at the pleasure of the Nashua & Lowell Railroad Corporation, or, in case of its non-renewal, the decrease of joint income, and expense caused thereby, shall thereafter be equitably considered in the division account between these parties.

All contracts for the transportation of property or persons heretofore made by either party, and still remaining in force, shall be assumed and carried out by these joint parties, and the receipts from the same for the current time be put into the joint income. A'l contracts for supplies necessary for the ordinary operation and maintenance of the roads, now made by either party, shall be assumed by the joint parties hereto, and settled from the joint funds.

Article III.

There shall be reserved to the separate use and control, and to be maintained at the separate expense of each party owning the same, all lands which are not part of their depot grounds, or right of way, or required for the convenient and economical operation of the roads; all buildings not required in connection with the service of the roads, and also all personal property of each corporation accumulated to the date of this contract, excepting the rolling stock, tools, materials and fuel on hand, which shall be particularly appraised into the common stock; the said reserved lands, buildings, and movable property, other than cash and paper secureties, reserved as above to the separate use and charge of each party owning the same, being particularly specified, as follows, viz:

To the Nashua & Lowell Railroad Company.—Their vacant lot lying between the Western avenue and the Pawtucket canal in Lowell, containing about 133,000 square feet; lot containing abont 3,900 square feet, with building thereon, situated in Lowell, on east side of Fletcher street, between Dutton street and Pawtucket canal, now rented for a flour store; the two-story dwelling and lot attached, opposite the depot at North Chelmsford, now rented to Rev. B. F. Clark; the rooms now rented, and to let, in their railroad

buildings at Nashua, except the express and refreshment room in passenger station.

To the Boston & Lowell Railroad Company.—The flats at East Cambridge and Boston, outside of the location of the road and below tide; their brick block of five houses on Andover street, Boston, and so much of their land northwest thereof, fronting on Andover and Minot streets, as will not be required for the convenient access and egress of the engines and trains to and from the passenger station; all lands between the Fitchburg crossing at Somerville and the Arch bridge in Lowell, which are outside of the location or fence, and not wanted for the service of the roads; J. A. Ames' store, at Wilmington; John H. Pearson's store, at Lowell; land on Adams and Worthen streets, Lowell, leased to A. L. Brooks & Co.; land on Fletcher and Dutton streets, Lowell, leased to A. L. Brooks & Co.; store at corner of Dutton and Fletcher streets, Lowell, leased to John O'Connor; all lands owned by them jointly with the Eastern Railroad Company on southeasterly side of Causeway street, in Boston.

Article IV.

Each party shall be separately liable for its unsettled
36 claims or accounts up to the date of this agreement, or for any action brought on account of anything previous thereto: But all liabilities growing out of or arising under this contract, and not specially accepted herein, shall be met from the joint income.

Article V.

The joint roads shall be operated and managed by one agent, who shall be chosen by the concurrent vote of a majority of the directors of each party, and may be removed in like manner, or by the unanimous vote of either board; and the respective boards of directors shall, by such concurrent action, exercise the same control over the management as is usual with boards of railroad directors in ordinary cases.

Article VI.

The party of the first part shall complete, within the year 1857, at its own separate cost, the new passenger depot at Causeway street, in Boston, together with the tracks, bridges, and all necessary fixtures connected with the said extension into the city of Boston; and also, at its own separate expense, make such alterations in the present Boston passenger depot as have been designed by said Boston and Lowell Railroad Company for converting it into a freight depot. The said first party shall also cause to be completed, without charge to the second party, and at the earliest practicable time, the crossing over the Fitchburg railroad, now being constructed, and also the connection with the Grand Junction road, at the same place, as soon as can be done at reasonable cost to the Boston and Lowell road.

Article VII.

The party of the second part shall, at its own separate cost, and within the year 1857, erect a freight depot, with its necessary approaches and furniture, in the city of Lowell, upon the site on Western avenue, which, during the continuation of this agreement, may be used for the accommodation of the joint business; said building to be one story in height, and not less than three hundred feet in length, as may be required for such accommodation.

Article VIII.

The road-bed, bridges, superstructure, depots, buildings, and fixtures of each road shall be kept, as near as may be, in like
37 relative repair, from their present state and condition, and all casualties and damages to the same (fire risks on buildings excepted) shall be at the common risk, and charged in the current joint account. The risk of destruction or damage by fire to all buildings shall be borne by the parties owning the same respectively; and in case of destruction or injury to any of said buildings by fire, the party owning the same shall proceed at once, at its own separate cost, to rebuild or replace said building, or such substitute therefor, as the wants of the joint business may require: Provided, Such party shall not at its separate cost, be required to erect a more expensive building, in any case, than the one injured or destroyed.

Article IX.

The cars, engines, and furniture of each road, with stationary engines and tools in machine shops and for road repairs, shall be accurately inventoried and appraised by persons mutually agreed upon for this purpose, and be kept in equal comparative repair from their present state and condition; and any additions to the same, above what is necessary to cover depreciation, made during the continuance of this contract, shall belong to the respective parties in the same proportion as is hereinafter agreed upon for the division of the joint income.

Article X.

A full inventory and appraisal shall also be made, by persons mutually agreed upon for this purpose, of all stock in the machine shops, and wood and oil, or other operating materials on hand and owned by each separate party at the commencement of this contract, and the amount of such appraisal shall be charged to the current joint expense account, accrediting to the respective parties the portion put by each into the common stock; and, on the termination of the contract, all such common stock and materials remaining on hand shall be apportioned between the parties, in the same ratio as is hereinafter provided for the division of the joint income.

Article XI.

The salaries of presidents, directors, treasurers, clerks, or servants of each separate corporation, as such, shall be paid from the separate fund of each, and not from the joint account.

Article XII.

The annual tax assessed by the State of New Hampshire
38 upon the Nashua and Lowell and Wilton railroads shall be considered an ordinary expense, and paid, for the current time, from the joint funds, in the same manner as taxes upon all other property in joint use, and not elsewhere reserved to the separate control and maintenance of each party.

Article XIII.

The insurance premiums paid by either party, on unexpired policies, for the risk upon cars, engines, tools, freight, wood, or other things, which are hereby agreed to be at the common risk, shall be apportioned in such manner as to become a common charge, from and after the date of this agreement, each party paying its own premium for the portion of time up to the said date, and charging to the joint account the unexpired portion; and the same apportionment shall be made of any and all payments for rents made by either party for a time extending beyond this date and inuring to the common benefit.

All prepayments to either party on transportation account, for season or package tickets, or any other prepaid income, except rents from reserved buildings, shall be apportioned as above, and each party shall be charged, to the benefit of the joint account, with their collections on such unexpired portion of said prepayment.

Article XIV.

The income and expense accounts of the joint roads shall be made up, as nearly as conveniently may be, by estimate, to the close of each month, and the net balance appearing shall be divided, upon the general basis of division, hereinafter stated, and paid over, on account, to the respective treasurers of the parties, subject to a final adjustment at the semi-annual closing of the accounts.

On, and to, the first day of April and October in each year, the said accounts shall be accurately closed and balanced out by settlement with each party, covering and adjusting all previous payments on account, the party of the first part receiving as its proportion sixty-nine per cent., and the party of the second part thirty-one per cent. of said joint net income, the said thirty-one per cent. to said second party being in full for the net proportion of the Nashua and Lowell and Wilton roads, but not including the dividend of the
Stony Brook road, which, in a previous article, is provided to
39 be paidf rom the joint fund. And each party may separately, and on its own account, declare such dividends upon its own stock, and payable from its own separate funds, as it may deem expedient, it being hereby distinctly provided that the interest upon

the debts of either party must also be paid out of such separate share, and not from the common fund.

Article XV.

This indenture shall be construed as a business contract solely, and in no sense as a lease of one road to the other, or as a union of the corporate powers or privileges, each party retaining to itself all of its chartered rights and liabilities and the power to sue, or the liability to be sued, in its own separate name and capacity, in the same manner and to the same extent as heretofore, excepting that in so far as between these parties the rights and liabilities of one with the other shall be settled and determined by this agreement.

Article XVI.

For the purpose of facilitating the execution of any of the improvements contemplated, or work to be done by either party on its own account, as heretofore specified, it is hereby agreed that all use of the joint roads, machinery, or property required for such purpose shall be permitted, so far as the same does not conflict with the proper transaction of the joint business, and the cost thereof, without profit, charged to the party so using.

Article XVII.

Any controversies arising as to the true intent and meaning of this contract, or its proper fulfilment, may at any time be submitted, at the request of either of the parties, to William H. Swift, of Boston; George Y. Sawyer, of Nashua, and James B. Francis, of Lowell, the report and order thereon of a majority of whom shall be final.

If a vacancy shall occur in such board of arbitrators some other person or persons shall be appointed by the directors, by mutual agreement, or in case they are unable to agree, the remaining arbitrator or arbitrators shall make such appointment.

Article XVIII.

This contract shall take effect on the first day of February, A. D. 1857, and shall continue in force until the first day of April, A. D. 1860, unless annulled by vote of the stockholders of either road, as hereinafter provided, it being understood and agreed that either of said corporations shall have power to terminate the same at their first meeting next succeeding the date hereof, or any subsequent meeting holden within sixty days after the first day of April, A. D, 1858; otherwise, it is to remain in force the full term aforesaid.

In witness whereof, the presidents of the respective corporations, duly authorized thereto, have hereunto subscribed their names and affixed the seals of said corporations, the day and year first above written.

WM. PARKER, [L. S.]
President Boston & Lowell Railroad Corporation.
F. B. CROWNINSHIELD, [L. S.]
President Nashua & Lowell Railroad Corporation.

In presence of us.
GEO. STARK.
T. P. TENNEY.

At a meeting of the directors of the Nashua & Lowell Railroad Corporation, held in Boston on the twenty-ninth day of January, A. D. 1857, it was voted—

"That the agreement made with the Boston & Lowell Railroad Corporation for the joint running of the two roads be ratified and adopted by this board, and that the president be authorized to sign the same on behalf of this corporation."

A true copy of the record.
Attest: GEO. STARK, *Clerk.*

At a meeting of the directors of the Boston & Lowell Railroad Corporation, held in Boston on the 29th day of January, A. D, 1857, it was voted—

"That the agreement made with the Nashua & Lowell Railroad Company for the joint running of the roads be ratified and adopted by this board, and that the president be authorized to sign the same on behalf of this corporation."

A true copy of the record.
Attest: THOMAS P. TENNEY, *Clerk.*

41 EXHIBIT C.

Central Vermont Railroad on Account of Northern Transportation Company.

DR.		CR.	
1875.		1875.	
Apr. 26. To cash	13,788.55	May 12. By contingent fund	13,788.55

Trustees of Sinking Fund for Redemption of Ogd. & Lake Champlain R. R. and N. T. Co.'s Bonds.

DR.		CR.	
1875.		1881.	
Apl. 26. To cash	3,295.13	Jan'y 31. By contingent fund	3,295.13

The Replication of the Plaintiff to the Answer of the Nashua & Lowell Railroad Co. of New Hampshire. Filed June 13, 1881.

Circuit Court of the United States, District of New Hampshire.

THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL RAILRAOD CO. OF NEW HAMPSHIRE *et al*

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith: That it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is

uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

By WALLACE HACKETT,
Pl'ff's Solicitor.

42 *The Answer of George Stark to the Plaintiff's Amended Bill of Complaint. Filed July* 11, 1881.

Circuit Court of the United States, District of New Hampshire.
In Equity.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
v.
THE NASHUA AND LOWELL RAILROAD COMPANY *et al.*

And now comes George Stark, defendant in said action, and for answer to the plaintiff's amended bill, and so much thereof as he is advised it is necessary and material for him to answer, says as follows, viz:

First. He admits that on the twenty-fourth day of February, A. D. 1871, an agreement in writing was made and executed by and between the Northern Transportation Company of Ohio, and the party of the first part, J. George Smith and George Stark, parties of the second part, and the trustees and managers of the Vermont Central Railroad and the Vermont and Canada Railroad Companies, the Boston and Lowell Railroad Corporation, the Nashua and Lowell Railroad Corporation, and the Northern railroad, parties of the third part, and the plaintiff, party of the fourth part, of which contract the copy annexed to the plaintiff's bill and marked "A," is, as he believes, a substantial copy, and he refers to the said original contract to ascertain what are the agreements made therein by the parties thereto and for the true construction thereof.

Second. He denies that he is or ever was one of the trustees and managers of the Vermont Central Railroad and the Vermont and Canada Railroad Companies.

Third. He admits that at the time of the execution and delivery of said contract the road of the plaintiff and its equipments and appurtenances were in the possession of the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Railroad Company under the provisions of a deed or contract
43 bearing date the twenty-fourth of February, A. D. 1870, which he asks that the plaintiff shall produce in court, that the provisions and true construction of it may appear to the court; but he denies that by reason of such deed or contract the plaintiff had no interest whatever in the said contract, a copy of which is annexed to its bill and marked "A," and alleges that it was a party

thereto and was largely interested therein and in the business done thereunder.

Fourth. He alleges that by the true construction of said contract the several parties of the third part thereto each agreed, while the same was in force, only to appropriate and pay over to the parties of the second part thereto under any circumstances such part of the sum of one hundred and fifty thousand dollars ($150,000) each half year out of the gross receipts from the business received by them from the Northern Transportation Company as its own gross receipts from such business should be unto the total aggregate of gross receipts from such business by all the parties of the third part of said agreement, and that such semi-annual reservation and payments of all the parties of the third part were under no circumstances ever to exceed in the aggregate the sum of one hundred and fifty thousand dollars ($150,000) for each half year, and were under no circumstances to exceed the actual gross receipts by each party of the third part in any half year from the business brought to such party at Ogdensburg by the Northern Transportation Company in such half year.

And he says that by virtue of article fifth of said agreements the parties thereto of the third part were only to reserve and pay over to the plaintiff each six months out of said semi-annual reservation of one hundred and fifty thousand dollars (150,000) from gross receipts from business brought to said parties by the Northern Transportation Company during that six months, as long as said contract was continued, such sums as would pay the semi-annual interest on the six hundred thousand dollars ($600,000) to be advanced by the plaintiff to the parties of the second part, and also out of said reservation of one hundred and fifty thousand dollars ($150,000) to pay over to the trustees of the sinking fund, established by such agreement, such sums semi-annually as said trustees of the sinking fund should from time to time judge sufficient when invested in a sinking fund to pay all excess of the advances of the plaintiff over
41 five hundred thousand dollars ($500,000) within two years from the date of the said agreement, and the remainder of said principal of said advances on or before the expiration of the term for which said contract was to continue, and also out of said reservation of one hundred and fifty thousand dollars ($150,000) to pay such further sum semi-annually to said trustees as when invested in a sinking fund in the judgment of said trustees would purchase four hundred thousand dollars ($400,000) of the mortgage bonds of the Northern Transportation Company within ten years from the date of said contract.

Fifth. He says that to the best of his knowledge, information, and belief all the arrangements and agreements by said parties of the third part with reference to the collection of the gross receipts from the traffic in freight and passengers on business derived by said parties of the third part respectively under said contract with said Transportation Company and the payments to the plaintiff and to the trustees under the sinking fund are contained in the contract, a substantial copy of which is annexed to the plaintiff's bill.

Sixth. He says that the Boston and Lowell Railroad Corporation, after the execution of said agreement, received all the gross receipts belonging to or accruing to each of the said parties of the third part from such portion of the traffic in freight and passengers on business derived by said parties of the third part respectively under said contract with said Transportation Company as was brought to Boston over the road of the Boston and Lowell Railroad Corporation, and that during the time that this defendant was manager of the Boston and Lowell Railroad Corporation an account of such business was kept and of all payments made therefrom, but he says that such accounts were kept by the treasurer of the Boston and Lowell railroad for the time being in the ordinary course of business in his office, and he has no knowledge of the details thereof, nor does he know what accounts, if any, of such receipts and payments were made, exhibited, or rendered to each of said parties of the third part by said treasurer or by the trustees and managers of the Vermont Central Railroad Company and the Vermont and Canada Railroad Company, and he denies that from time to time settlements of said account were made with the defendant, and sums found due the defendant under and in conformity to said accounts paid to the defendant, as alleged in the plaintiff's amended bill, but he says that from time to time up to and including the month of August, 1874, the payments to the party of the fourth part and to the trustees of the sinking fund of the amount agreed upon semi-annually, as provided in said contract, were made out of funds in the hands of said Boston and Lowell Railroad Corporation collected in behalf of each of the parties of the third part from joint freight and passengers brought to and from the steamers of the party of the first part.

Seventh. He says that he has not, nor has said Smith, the other party of the second part to said contract, to his knowledge, information, or belief, now in his hands any sum of money received under and in pursuance to said contract, or any other thing of any character or any value applicable to the payment of the plaintiff's said advances, and he is ignorant whether said trustees of such sinking fund have now in their hands any such money or thing.

Eighth. He denies that on the seventh day of October, A. D. 1871, the plaintiff, upon the requisition of said parties of the second part to said agreement, in conformity to the terms thereof, and for the purposes set forth therein, paid to said parties of the second part the sum of six hundred thousand dollars ($600,000) as in said bill alleged; but he says that at that time the parties of the second part to said agreement did, at the request of the plaintiff, receive from it the sum of five hundred and seventy-six thousand dollars ($576,000) for the purposes set forth in said agreement, and which the parties of the second part to said agreement did thereafterwards disburse in the manner and for the purposes set forth in said agreement.

He admits that the two presidents and treasurers of the Boston and Lowell Railroad Corporation and of the plaintiff did upon consultation fix and determine the amount of the several payments necessary to be made by the parties of the third part to said trustees in order to create the sinking fund necessary for the purposes set

forth in said agreement, and did notify said parties of the third part of the amounts thus fixed and to be paid.

And he says that from time to time thereafter, up to and including the month of August, A. D. 1874, there was paid to said
46 trustees as aforesaid, from the money of each of the said parties of the third part, in the proportion that its gross earnings bore to the aggregate gross earnings of all the said parties of the third part, an amount equal in the aggregate to the sum thus fixed and defined by said trustees, but he does not know whether since the month of September, A. D. 1874, either of the said parties of the third part have made any payments to said trustees towards such sinking fund.

Ninth. He admits that some time in January, A. D. 1875, the Northern Transportation Company became embarrassed, and by virtue of certain proceedings in a court of law or equity, the precise character of which he does not know, but which he is informed and believes were instituted for the purpose of foreclosing a first mortgage upon its property and steamers, all its property, including the steamers employed in transportation under said contract, was taken from its possession and control, and placed in the hands of a receiver appointed by said court; but he does not know whether such receiver continued to employ and use said steamers and property in said service of transportation to and from said lines of railroads of the parties of the third and fourth parts upon the same terms and in the same manner appointed by said contract until on or about the first day of February, A. D. 1876, when said steamers and property were by order of said court sold, disposed of, and delivered to other parties, and were no longer continued in said service of transportation, as is stated in said bill.

Tenth. He says that he was named as one of the parties of the second part to said contract, a copy of which is annexed to the plaintiff's bill and marked "A," because he was then the general manager of the Boston and Lowell Railroad Corporation; that he had no personal interest in said contract or in any of the matters and things to be done and performed under it; that it is provided by article fourth of said contract that the parties of the second part thereto are to assume no personal liability to repay the money advanced by the parties of the third and fourth parts, but to apply the same according to the terms of said agreement, and to hold said stock, receipts, and other property in trust, and apply the same and the dividends thereon and income thereof as in said contract provided.

47 He further says that in March, A. D. 1875, he resigned his position as manager of the Boston and Lowell Railroad Corporation, and ceased to have any connection with said corporation, or with any of the corporations parties to said contract, and shortly after that time he became vice-president in charge of the affairs of the Northern Pacific railroad, the duties of which position absorbed all his time and attention, and although he continued to be a director of the Boston and Lowell railroad till January, 1876, he was not able to give, and did not give, any attention to its business affairs after March, 1875.

And he further says that the said J. Gregory Smith, the other party of the second part to said contract, was made party of the second part thereto because he was then president of the Vermont Central Railroad Company, and in charge of the affairs of the Vermont Central and Vermont and Canada Railroad Companies, and, as this defendant is informed and believes, said Smith has continued to hold such positions to the present time.

At the time this defendant ceased to be connected with the Boston and Lowell Railroad Corporation the boats of the Northern Transportation Company had ceased to be employed by it in the service of transportation contemplated by said contract, and whatever duties there were to be performed by said parties of the second part under said contract were performed by said Smith; but this defendant is not informed, and has no reason to believe, that after he ceased to be connected with the Boston and Lowell Railroad Corporation in March, A. D. 1875, there were any duties to be performed by said parties of the second part to said contract.

Eleventh. He says that he does not know what proportion the gross earnings of the Nashua and Lowell railroad, the other defendant, from the traffic brought to it by the boats of said Transportation Company, up to the time when the boats and property of said company were sold, as stated in the plaintiff's bill, were of the amount of the gross earnings therefrom by all said parties of the third part to said contract; but he is informed and believes that there was paid over to the trustees of the sinking fund under the provisions of said agreement from the gross receipts of the Nashua and Lowell railroad a sum sufficient to cover the
48 amount which was claimed by the plaintiff and said trustees to be due from it under said contract from the date of the execution of said contract up to and including the twelfth day of September, A. D. 1874, but he does not know whether it has now in its hands any money derived by it from said gross receipts.

Twelfth. This defendant alleges that he has made answer to all and several the allegations and charges in said plaintiff's amended bill of complaint he is advised it is material to answer; and prays this honorable court to be hence dismissed, with his costs.

GEO. STARK.

STATE OF NEW YORK, *City and County of New York:*

On this 15th day of July, A. D. 1881, before me personally appeared George Stark, and made oath that he had read the above answer, to which he has subscribed his name, and that he knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

[SEAL.] W. Q. RIDDLE,
Notary Public, New York Co.

The Replication of the Plaintiff to the Answer of George Stark. Filed July 25, 1881.

Circuit Court of the United States, District of New Hampshire. In Equity.

THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL RAILROAD CO. OF NEW HAMPSHIRE *et al.*

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by its said bill it hath already prayed.

By WALLACE HACKETT,
Pl'ff's Solicitor.

49 DISTRICT OF NEW HAMPSHIRE:

OGDENSBURGH & LAKE CHAMPLAIN R. R. COMPANY
vs.
NASHUA & LOWELL R. R. COMPANY.

It is stipulated and agreed by defendant that its original answer shall be deemed to contain the same statement as to paragraph 7 of plaintiff's bill as is contained in the answer of the Boston & Lowell Railroad Company in the suit of plaintiff against that company pending in the district of Massachusetts.

January 28, 1884.

NASHUA & LOWELL RAILROAD CORPORATION,
By its Solicitor, F. N. BROOKS.

United States Circuit Court, District of New Hampshire. In Equity.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL RAILROAD COMPANY OF N. H. *et al.*

Filed January 24, 1883.

And now the plaintiff, by leave of the court here, amends its bill as follows:

1. By inserting on the first page thereof, before the words "against George Stark, of Nashua," the following words, viz: "John C. Pratt,

of Boston, in the State of Massachusetts, a citizen of said State of Massachusetts; Charles E. A. Bartlett, of Lowell, in said State, and a citizen of said State; Henry A. Church, of said Boston, a citizen of said State."

2. By inserting on the fifth page thereof, at the end of the seventh paragraph, after the words "service of transportation," the following words: "At the date of the execution of the contract, copy of
50 which is annexed to plaintiff's bill, and thenceforth until after the first day of February, 1876, the person who held the office of president of the said Boston and Lowell Railroad Company was Francis B. Crowninshield, now deceased, and who died before the filing of plaintiff's bill; the person who held the office of treasurer of the said Boston and Lowell Railroad Company was the defendant, Charles E. A. Bartlett; the person who held the office of president of the plaintiff corporation was the defendant, John C. Pratt, and the person who held the office of treasurer of the defendant corporation was the defendant, Henry A. Church."

3. By inserting the names of said defendants, the said Pratt, Bartlett, and Church, in the plaintiff's prayer for process.

By S. BARTLETT,
Plaintiff's Solicitor.

The Answer of Henry A. Church, one of the Defendants in the Above-Entitled Cause. Filed April 20, 1883.

Circuit Court United States, District of Massachusetts. In Equity.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
NASHUA AND LOWELL RAILROAD CORPORATION.

This defendant, for answer to said bill, or to so much thereof as he is advised it is material or necessary for him to make answer, answering, says:

First. He admits the due execution and delivery of the contract, copy of which is annexed to plaintiff's bill by the respective parties thereto, and that at the time of said execution of said contract and thereafterwards, until the first day of February, in the year of
51 our Lord 1876, the person who held the office of president of the Boston and Lowell Railroad Company was Francis B. Crowninshield, who died before the filing of plaintiff's bill. The person who held the office of treasurer of said company was the defendant, Charles E. A. Bartlett. The person who held the office of president of the plaintiff corporation was the defendant, John C. Pratt, and that this defendant was the person who held the office of treasurer of the plaintiff corporation.

Second. He admits and states that under the provisions of article second of said contract there was advanced by the plaintiff to the parties of the second part to said contract in its eight per cent. sinking fund bonds the sum hereinafter stated, and that in conformity to the fifth article of said contract there was duly fixed and determined by the said trustees of the sinking fund the sums to be paid

semi-annually by the parties of the third part to said contract, in order to constitute the sinking fund therein provided to be established, which semi-annual payments were to be made in amount, as follows:

To pay March 1, 1873, $100,000 of the said bonds advanced by the plaintiffs aforesaid the sum of ---------- $24,000
To pay in 1881 $400,000 of the bonds of the Northern Transportation Company---------- 15,000
To pay in 1890 $500,000 of the said bonds of plaintiff---- 7,500

Which said semi-annual payments after the payments to said sinking fund of the sum necessary to pay as aforesaid in 1873 the bonds of the plaintiff to the amount of one hundred thousand dollars were to be reduced to the semi-annual payment of $22,500.

Third. This defendant, by the act and consent of the other trustees of said sinking fund, was constituted and acted as treasurer of the said trustees, and received all sums of money towards said sinking fund by or in behalf of said parties of the third part, which sums, and the dates of the payment thereof, are shown by the schedule hereto annexed, marked B, and no other sums to constitute said sinking fund were ever paid by or in behalf of the parties of the third part, or either of them, under said article 5 of said contract, or otherwise.

Fourth, The amount of its sinking fund eight per cent. bonds delivered by plaintiff to the trustees of said sinking fund, pursuant to said contract, was 600 bonds of $1,000 each, as shown by
52 the receipt therefor, a copy of which is hereto annexed, marked E, but in pursuance of an arrangement shown by the letter hereto annexed marked D, which was acted upon with the concurrence of the parties, a premium of four per cent. was allowed to plaintiff on the amount of said 600 bonds, which premium was paid to plaintiff either by the retention by plaintiff of 24 of said bonds or by the delivery to plaintiff of said amount of said bonds.

Fifth. A true and correct account of all the receipts and expenditures of the trustees of said sinking fund is hereto annexed, marked C.

At the time of the filing plaintiff's bill there was held by the trustees of said sinking fund, and as part thereof, a promissory note of one Elijah Smith for the sum of $8,800, being a sum temporarily loaned to him from said fund at a period when said trustees were unable to invest the same at any reasonable rate in the bonds in which, by the terms of said contract, said fund was to be invested; the said note of said Smith was secured by a pledge to said trustees of fifteen first mortgage bonds of $1,000 each of the Burlington and Southwestern Railroad Company. The mortgage securing said bonds was subsequently foreclosed and the road disposed of, and said trustees received the amount of said bonds thus pledged to them by said Smith in the four per cent. bonds of the Chicago, Burlington & Quincy Railroad Company, which last-named bonds said trustees have since sold, and applied the proceeds of said sale, together with the small cash balance in their hands, to the purchase

of bonds provided for by said contract annexed to plaintiff's bill, so that they now have in their hands no sum which has not been applied and invested according to said contract, all which contracts are shown by the said account hereto annexed, marked C.

HENRY A. CHURCH.

On this 9th day of February, 1883, before me, personally appeared Henry A. Church and made oath that he has read the above answer subscribed by him and knows the contents thereof, and the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true. Before me—

WINSLOW WARREN,
Com'r U. S. Cir. Court.

53 (B.)

Payments to H. A. Church, Treas'r, Trustees of Sinking Fund Northern Transportation Co. and Ogdensburgh and Lake Champlain Railroad Co. Bonds.

1871, Oct. 27.	From Geo. Stark, man'r	Boston & Lowell R. R.	46,500
1872, M'c'h 1.	do.	do.	46,500
Sept. 9.	do.	do.	46,500
1873, Apr. 14.	do.	do.	46,500
Sept. 10.	do.	do.	22,500
1874, M'c'h 3.	do.	do.	22,500
Sept. 14.	do.	do.	22,500
			253,500

(E.)

BOSTON, *Oct.* 7, 1871.

Received of Henry A. Church, treasurer of the Ogdensburgh & Lake Champlain railroad, six hundred bonds of the value of one thousand dollars each, issued by the Ogdensburgh & Lake Champlain Railroad Co., and dated March 1st, 1871, with coupons of forty dollars each attached thereto, numbered 2 to 38, (both numbers inclusive.)

C. E. A. BARTLETT,
Treas. Boston & Lowell R. R. Co.

(D.)

BOSTON, *March* 4, 1871.

JOHN C. PRATT, *Pres't.*

DEAR SIR: If in place of the money which the Ogdensburgh & Lake Champlain R. R. Co. is to advance to us under the agreement to secure steamboat connections west of Ogdensburgh, your company will deliver us its eight per cent. bonds for an equal amount we will allow a premium of 4 per cent. on the same, and we will also pay your company $20 a share for the N. T. Co. stock which they own. It being understood that 470 shares of said stock is

owned by said company, and is to be transferred to us as above at $20 a share.

GEO. STARK,
For self and for J. G. Smith, Exe. Com., &c.,
Vermont Central Line.

54 (C.)

Trial Balance Trustees Northern Transportation and Ogdensburgh & Lake Champlain Railroad Co. Bonds to Dec. 9th, 1882.

1873, July.	Amount paid for $132,0000 Og. & Lake Champlain Sinking Fund Bonds as principal	132,000 00		
	Prem. & int.	3,935 33		
			135,935	33
1877, July.	Am't p'd for $74,000 Og. & Lake Champlain Sinking Fund Bonds and interest		72,953	64
1878, April.	Am't p'd for $2,000 Og. & Lake Champlain Sinking Fund Bonds and interest		2,065	12
1882, Nov.	Am't p'd for $1,000 Og. & Lake Champlain Sinking Fund Bond, prem. and interest		1,047	89
Dec. 9.	Am't p'd for $11,000 Og. & Lake Champlain Sinking Fund Bonds, prem. and interest		11,711	45
1874, M'c'h.	Am't p'd to date for $73,500 Northern Transportation Company Morg. Bonds and interest		72,403	65
1878.	Am't p'd sundry expenses buying N. T. Co. bonds, exp., etc.		54	14
			296,171	22

NOTE.—$220,000 Og. & L. C. R. R. S. F. Bonds cancelled. $380,000 still outstanding:
$73,500 N. T. Co. bonds on hand.

1873, Apr. 14.	By 4 installments of $46,500 each rec'd to date from manager Boston & Lowell railroad		186,000	00
1874, Sep. 14.	3 installments of $22,500 each rec'd to date from manager Boston & Lowell railroad		67,500	00
"	Am't rec'd from manager Boston & Lowell R. R. Interest to date 6 per cent. on $132,000 Og. & Lake Champlain Sinking Fund Bonds bought and cancelled.		16,380	00
	Interest collected as follows to Dec. 17, 1877:			
	From loans	727 81		
	Coupons on Northern Trans. bonds	14,943 00		
	Coupons on Og. & Lake Champ. bonds	7,120 00		
			22,790	81

55 1882, Dec. 9. Interest rec'd from loan to E. Smith, being gain on securities rec'd from him and none sold 3,412 26
Dec. 9. Interest rec'd at sundry times from New England Trust Co. 88 15

296,171 22

E. E. H. A. CHURCH, *Treas.*
Boston, Dec. 9, 1882.

The Replication of the Plaintiffs to Answer of Henry A. Church. Filed April 20, 1883.

United States Circuit Court, District of New Hampshire. In Equity.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA AND LOWELL CORPORATION.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this that any other master or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied is true, all which matter and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

By WALLACE HACKETT,
Plaintiff's Solicitor.

56 Circuit Court of the United States for the District of New Hampshire. In Equity.

THE OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY
vs.
THE NASHUA & LOWELL R. R. CO.

The deposition of J. Gregory Smith, a witness on behalf of the defendant in the above-entitled action, taken before Fisher Ames, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under the acts of Congress in such case made and provided, at Boston, in the district of Massachusetts, on the fifteenth day of February, A. D. 1884, by agreement of parties.

Francis A. Brooks, Esq., appeared for the defendant, and Sydney Bartlett, Esq., for the plaintiff.

The said J. GREGORY SMITH, having been first by me duly sworn, gave the following deposition:

Direct examination by FRANCIS A. BROOKS, counsel for defendant:

Int. 1. Were you and General Stark the parties of the second part to the boat contract, so-called, dated February 24, 1871, annexed to plaintiff's bill of complaint in this case and marked "A"?

Ans. I was.

Int. 2. At and before the execution of the boat contract were you and General Stark the executive committee of the Vermont Central Line, so-called, and as such the managers of the Ogdensburg railroad under the lease thereof, dated February 24, 1870?

(Objected to, for form and substance.)

Ans. I think General Stark and myself were on the executive committee as managers of the Vermont Central Line, so-called, and my recollection is, although I am not quite positive on that point, that we were designated by that executive committee as the managers of the Ogdensburgh and Lake Champlain railroad.

Int. 3. Whether or not as such executive committee you entered into a contract with Philo Chamberlain, president of the Northern Transportation Company, for the purchase of a majority of
57 the capital stock of said company, said contract being the same annexed to defendant's answer, and marked Exhibit "B," a copy of which is now shown you?

(Objected to for substance.)

Ans. With General Stark as executive committee I did execute the contract.

Int. 4. Whether or not that contract was fulfilled and the purchase made of the shares referred to in that contract?

(Same objection.)

Ans. I am not able to answer that question definitely. I have no reason to doubt that the contract was fulfilled and the stock purchased, but to what extent I am not able to say without referring to records which I have not at hand. The principal part of that business was transacted by General Stark.

Int. 5. Have you ever seen a letter of the president of the plaintiff corporation to General Stark, bearing date February 14, 1871, and relating to the negotiation for the capital stock of the Northern Transportation Company?

(Objected to as immaterial to the case.)

Ans. I have seen such a letter, and I have the letter purporting to be the original one in my hand.

Int. 6. Will you annex to your deposition that letter and the paper purporting to be an attested copy of the vote therein referred to?

Ans. I will.

(Papers produced marked Exhibits Smith "A" and "B" (F. Ames, Comm'r, February 15th, 1884), and annexed.

Int. 7. Whether or not the officers of the plaintiff corporation, or

any of them, before furnishing funds to yourself and Stark under the boat contract had any knowledge of the existence of the Chamberlain contract above referred to, or of any contract by you and Stark to get control of the Northern Transportation Company?

(Objected to, as immaterial and impertinent.)

Ans. I could not say whether the contract referred to was ever submitted to the Ogdensburgh railroad or any of its officers in any negotiation for the issuance of the bonds of the Ogdensburgh road. I think the general purposes contemplated under the contract were discussed with them.

Int. 8. Whether or not the line of steamers on the lakes owned by the Northern Transportation Co. did not run to and from
58 Ogdensburgh at and before the time of leasing the road in Feb., 1870?

Ans. They did.

Int. 9. Whether or not the plaintiff corporation, with the other railroads between Rouse's Point and Boston, were jointly interested under any contract with each other for the business brought to Ogdensburgh by the steamers of the Northern Transportation Company before the date of the lease of the Ogdensburgh railroad?

(Objected to; if the contract was in writing it should be produced.)

Ans. It is very difficult for me to state from memory, but my impression is that there was no contract existing in which the Ogdensburgh and Lake Champlain railroad were a party.

Int. 10. Whether or not prior to the Ogdensburgh lease any arrangement existed between the railroads from Ogdensburgh and Boston and the Northern Transportation Co. for an interchange of traffic?

(Objected to, for substance.)

Ans. There was an arrangement which, I think, was made by the receivers and managers of the Vermont Central railroad with the Northern Transportation Co. for their traffic, but I do not recollect that the Ogdensburgh were a party to the making of the arrangement farther than that they were always willing to carry out and accept in the division whatever arrangement the Vermont Central by its receivers and managers made with the Transportation Co.

Int. 11. Whether or not the Northern Transportation Company failed during the year 1870 or latter part of said year?

(Objected to, for substance.)

Ans. They did.

Int. 12. Whether or not by reason of such failure the boats were likely to be withdrawn from the line to Ogdensburgh unless money were raised for the purpose of preserving such line?

(Objected to, for substance.)

Ans. They were.

Int. 13. Whether or not, in connection with the negotiation of the boat contract, the question arose as to the legal capacity of either the

Vermont Central Company or lower roads, so-called, to make themselves liable for the purchase money of the capital stock of the Northern Transportation Company, or property of that Co.?

(Objected to, as wholly impertinent to the issue, not inquiring with whom the question arose.)

59 Ans. That question did arise and was discussed before the contract was made.

Int. 14. Whether or not legal advice was taken by or in behalf of the Vermont Central or lower roads on that subject; and, if so, what was the result arrived at by those parties as to their legal capacity to become the purchasers of the stock or property of the Northern Transportation Company?

(Objected to, as being inadmissible.)

Ans. The question was referred to counsel, and they advised that in their judgment it was competent for roads in line to enter into a traffic contract with the Northern Transportation Company for the purpose of retaining their boats in line, and that in order to do so it was competent to appropriate the earnings derived from that business to such control.

Int. 15. Whether or not these roads were advised by counsel that it was not legally competent for them to raise money or to contract liability directly for the purchase of the capital stock of the Northern Transportation Company or boats of that company?

(Objected to, as before.)

Ans. I think it was the judgment of counsel that neither of the roads which were to be parties to the proposed contract had the right to appropriate the funds of their respective companies to the purchase of stock in an outside enterprise.

Int. 16. Do you remember the clause in the contract for embracing the lower roads as participants in the Ogdensburgh lease which provides against the abrogation of that lease without the written consent of the lower roads, being the contract annexed to the lease?

(Objected to, as before.)

Ans. I remember that there is such a clause, of that character.

Int. 17. Whether or not the plaintiff corporation ever released or discharged the receivers and managers of the Vermont Central and yourself and Stark from liability under the boat contract, or executed any instrument for that purpose, said instrument being the same, a copy of which is annexed to a stipulation between parties to this case, and is on file?

Ans. Such instrument was executed.

(The parties agree that the copy annexed to the stipulation referred to in the question is a correct one.)

Int. 18. Has any claim ever been asserted against the re-
60 ceivers and managers of the Vermont Central Line or your-

self and Stark under the boat contract since the date of that instrument?

(Objected to, as immaterial.)

Ans. Not to my knowledge.

Int. 19. Whether or not the plaintiff corporation knew the fact that you and Stark were the executive committee of the Vermont Central Line and in the management of the Ogdensburgh railroad as such at the time of the execution of this instrument of release?

(Same objection.)

Ans. I cannot say positively. I have no doubt they knew it.

Cross-examination by SIDNEY BARTLETT, counsel for plaintiff:

Cross-int. 1. Have the parties to the second part of the contract annexed to the plaintiff's bill any assets of any description in their hands?

Ans. Not to my knowledge.

J. GREGORY SMITH.

EXHIBIT A, SMITH.—F. AMES, *U. S. Com'r*, 15 *February*, 1884.

BOSTON, *February 14th*, 1871.

Gen. GEO. STARK.

DEAR SIR: I send you herewith a copy of the vote passed by our board. You will see that they are willing to advance one-half of any amount that may be required. Our counsel advise us that it would not be safe for us to issue bonds unless the control of the whole stock can thereby be secured.

Yours, very truly, JOHN C. PRATT, *Pres't.*

EXHIBIT B, SMITH.—F. AMES, *U. S. Com'r*, 15 *February*, 1884.

At a meeting of the directors of the Ogdensburgh and Lake Champlain Railroad Company, held February 10th, 1871, it was—

Voted that this board are willing to issue their bonds as proposed to the extent of three hundred thousand dollars or to an amount not exceeding one-half the sum required to secure the business and property of the Northern Transportation Company, provided the other roads in Vermont Central Line assume and advance a like sum.

Attest: HENRY A. CHURCH, *Sec'y.*

61 UNITED STATES OF AMERICA, *District of Massachusetts:*

I, Fisher Ames, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under the act of Congress authorizing the appointment of commissioners for the more convenient taking of affidavits and bail to be used in civil causes depending in the courts of the United

States, and the acts additional thereto, do hereby certify that J. Gregory Smith, the above-named deponent, appeared before me on the fifteenth day of February, A. D. 1884, at Boston, in the district of Massachusetts, and he having been by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, relative to the cause in the caption named, gave the foregoing deposition by him subscribed; that by agreement of parties said deposition was taken down in shorthand and afterwards written out and read by the deponent, and then subscribed by him as and for his deposition; that said deposition was taken at the request of the defendant in said cause.

And by agreement of parties said deposition is to remain open.

The exhibits annexed were marked and annexed by me.

I further certify that I am not of counsel nor attorney to either of the parties to the cause for which said deposition was taken, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and seal, this sixteenth day of February, A. D. 1884.

[SEAL.] FISHER AMES,
U. S. Commissioner.

Commissioner's fees, $6; paid by def't.

62 *Bill of Complaint. Filed March* 1, 1884.

UNITED STATES CIRCUIT COURT, *District of New Hampshire:*

NASHUA AND LOWELL RAILROAD CORPORATION *vs.* OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY.

To the judges of the circuit court of the United States for the district of New Hampshire:

The Nashua & Lowell Railroad Corporation, a corporation established by law in the State of New Hampshire, and a citizen of said State, brings this its bill of complaint against the Ogdensburgh & Lake Champlain Railroad Company, a corporation duly established by the laws of the State of New York, and a citizen of said State of New York, by whom a certain bill in equity was brought against the said Nashua and Lowell Railroad Corporation and George Stark in this hon. court, and filed in the clerk's office of said court on or about the 18th day of June, A. D. 1880, and is still pending; and the plaintiff brings this bill of complaint in the nature of a cross-bill in the said suit of the Ogdensburgh & Lake Champlain Railroad Company, and asks that it may be treated as a cross-bill in the said suit; and the plaintiff says that answers were duly filed to defendant's said bill of complaint by this plaintiff and the said George Stark as defendants thereto, and that replications to such answers were duly filed by said complainant, and that said complainant has proceeded to take evidence in support of its said bill, and has now notified this plaintiff of its desire to have the evidence on the part of the defendants in said suit speedily taken and closed; and that the said Nashua & Lowell Railroad Company as such defendant wishes to examine the said Ogdensburgh & Lake Champlain Railroad

Company, and to obtain a discovery from it as to certain matters relied upon as defences to said suit, which are not shown or set forth or referred to in any way in the said bill of complaint; and the plaintiff brings this bill of complaint against the said defendant corporation for the purpose of such discovery only, and prays that the said Ogdensburgh & Lake Champlain Railroad
63 Company may be compelled to answer the same before any hearing shall be had in the suit of said Ogdensburgh & Lake Champlain Railroad Company against this plaintiff.

And thereupon the plaintiff complains and says: That on or about the 13th day of January, 1865, the defendant corporation with the Vermont Central, the Northern, the Concord, the Boston & Lowell, and the plaintiff corporations, constituting together a continuous line of railroad from Ogdensburgh to the city of Boston and tide water, formed themselves into a business association for carrying all passengers and merchandise to or from points on the great lakes westerly of Ogdensburgh, said association being called the Vermont Central Line, and this line continued in existence until the 24th day of February, 1870, when the Ogdensburgh & Lake Champlain railroad became leased to the Vt. Central railroad receivers and managers, as hereinafter shown.

That there also existed for many years prior to 1870 a corporation formed for the conveyance of passengers and freight to and from Ogdensburgh over the great lakes, known as the Northern Transportation Company, and that this last-named company and the Vt. Central Line contracted together for an interchange of all the business of each of them to the exclusion of all other routes, and that a contract of this character was subsisting down to the 24th day of February, 1870, and later, and that prior to said lease the defendant corporation was largely dependent upon this traffic derived from or bound to and beyond the great lakes, for income or revenue arising from or upon its own railroad (extending from Ogdensburgh to Rouse's Point, a distance of one hundred and twenty miles).

And the plaintiff says that under these circumstances the defendant corporation entered into a contract on or about the 24th day of February, 1870, for the lease of its railroad for a term of twenty years to the trustees and managers of the Vt. Central railroad, so-called, being the same contract referred to in the bill of the defendant against the plaintiff, now pending as aforesaid in this court. And the plaintiff says it was well known and understood at the time of making said lease that the lessees therein named were in possession of the Vermont Central and Vt. & Canada railroads as receivers or officers of the court of chancery of Franklin county, Ver-
64 mont, and were not personally liable or responsible for the payment of the rent of the defendant's railroad, and could not be lawfully compelled to pay the same, and that some method must be devised for the payment of such rent besides and beyond the engagement of the lessees themselves. The said trustees or receivers thereupon proposed to the four corporations composing the route between Boston and White River Junction that they should participate in the lease to be so taken of the defendant's road, and

should share in the rental payable therefor in the proportion which their respective gross receipts from all business derived from said defendant road should bear to the total gross receipts therefrom of all the roads between Rouse's Point and Boston (the Concord railroad excepted), (provided, however, that no railroad company should in any event be required to contribute to said rental payments a sum in excess of its gross receipts for the time being from business brought to it from or over said defendant's road; that is, in excess of the increase of its gross receipts by reason of the business coming to it from the railroad of the defendant), and the railroad companies between Boston and White River Junction (excepting the Concord railroad) assented to this proposition, and entered into the agreement to participate in the payment of said rent to the defendant at the time of the execution of said lease.

And the plaintiff says that in order to induce the lower roads, or those easterly of White River Junction, to enter into said provisional liability to contribute to said rental payments, the receivers or trustees and managers, so-called, agreed that the management of the Ogdensburgh & Lake Champlain road should be placed in the hands of an executive committee of two persons, and J. Gregory Smith and George Stark were selected and appointed as such executive committee to manage the defendant's railroad under said lease, and this contract was concluded between the lessees and the said lower roads in regard to the management of said Ogdensburgh & Lake Champlain railroad by such executive committee with the knowledge and assent of said defendant at the same time with the execution of said instrument of lease; and thereupon the said Ogdensburgh & Lake Champlain railroad went into the hands, control, and management of said Smith and Stark as such executive committee, and both said contracts were made and took effect at one and the same time, and were parts of one and the same transaction.

65 And the plaintiff says that the contract marked "A" annexed to the bill of complaint of the defendant company against this plaintiff was not executed at the time of its date nor before the 29th day of August, 1871, and would not have been executed at all by this plaintiff had not this plaintiff already become a party to or interested in the lease of said Ogdensburgh railroad as aforesaid, and that between the time of the date of said contract "A" and of its execution it had been determined and agreed by the defendant corporation that the capital stock and property of the Northern Transportation Company should be purchased, and that it would provide and advance to Smith and Stark funds to the amount of $600,000, to be used by them in making said purchase, and thereby securing the regular running of the boats or steamers of the Transportation Company to and from Ogdensburgh, looking for reimbursement of said principal sum and interest at eight per cent. to the contributions to be made every six months by the several parties of the third part to said contract "A" in the proportion which their respective gross receipts from the boat business should bear to the total gross receipts of all the roads between Ogdensburgh and Boston, excepting

the Concord railroad, as provided in the second article of said contract "A," and such contributions were in the language of the contract, article 5th, to be "reserved" from or out of the gross receipts of the respective parties of the third part.

And the plaintiff says that the said Smith and Stark, parties of the second part to said contract "A," were then previously in the actual control and management of the railroad of the defendant corporation as the executive committee of the lessees of said Ogdensburgh & Lake Champlain railroad, and their associates (the lower roads, so-called), and that it was well known and understood by the defendant corporation, and by said lower roads, or railroad companies, chartered in New Hampshire and Massachusetts, that the latter had no legal capacity to purchase or to incur any liabilities in or for the purchase of the capital stock or property of the Northern Transportation Company, chartered by the laws of Ohio, and that any contract by which said New Hampshire and Massachusetts corporations should undertake to provide and pay out moneys for such a purchase, or to become liable therefor, would be incapable of enforcement at law or in equity.

66 And the plaintiff is informed and believes, and therefore avers, that the defendant corporation and the other parties to contract "A" before its execution were advised by counsel learned in the law to the effect that while the New Hampshire and Massachusetts corporations (parties of the third part) might lawfully contract to devote any portion of their own receipts from the business coming to them from the boats and steamers on the lakes to the reimbursement to the defendant of the moneys expended by it in the purchase or acquisition of the property and rights of the Northern Transportation Company (thereby securing the boat business to the line permanently), yet they could not themselves lawfully make any such purchase in the first instance, or become directly liable for the repayment of money so expended.

And the plaintiff says that the said Smith and Stark, acting as the agents or trustees of all parties to contract "A" (except the party of the first part), took the bonds of said Ogdensburgh & Lake Champlain Railroad Company of the par value of $600,000 or $576,000, furnished to them by the defendant corporation (and used and employed the same or their proceeds in the purchase of the property and shares of the Northern Transportation Company, as was understood and expected by the defendant corporation would be done with said bonds by them).

And the plaintiff says the defendant corporation well knew and understood that unless it provided the funds required for the purchase of the boats and shares of the Northern Transportation Company, the boats would be taken off the line to Ogdensburgh, and the business thereof lost, and the defendant corporation also well knew or understood that if the boats were thus taken off the line and the business traffic of the Ogdensburgh & Lake Champlain railroad rendered local merely, and thereby greatly reduced in amount, it would become very doubtful whether its merely local traffic, fed to or upon the lower roads, so-called, from said Ogdensburgh & Lake Cham-

plain road would be sufficient to enable it to get any considerable portion of the rental payments from or out of the lower roads, according to the terms of their liability to contribute to said rental payments, and so said defendant corporation was greatly interested in securing the purchase of said boats.

And the plaintiff says that said Smith and Stark having already become the agents and representatives of the lessees of
67 defendant's railroad for the operation and management of the same under the lease and for the purpose of securing to the line the traffic on the lakes, they were also by the terms of contract "A" made the trustees for whichever of the third or fourth parties to said contract should conclude to provide in the first instance the money necessary for purchasing and paying for the property and shares of said Transportation Company, and so gaining the control of said company; and as such trustees they were by the terms of said contract "A" required not only to expend all moneys placed in their hands in making such purchase, and in acquiring such control and management of the affairs of said Transportation Company, but also to hold said property so acquired and the income or earnings thereof as security for the repayment of the money so advanced to the party or parties advancing the same, that is, to the said defendant corporation; and the said Smith and Stark being also at the same time in actual possession and control of the Ogdensburgh railroad, and operating the same under the lessees, and being in receipt of the earnings of said road, and the representatives of the parties of the third part in contract "A" as to said Ogdensburgh railroad and its earnings, they became in duty bound as parties to contract "A" to personally make the reservation of so much of the gross receipts of that railroad as were necessary to provide the semi-annual payments of $150,000 referred to in and by article 2nd in said contract "A," if the said gross receipts were sufficiently large, and to comply with the terms of said contract in all other respects relating to said Ogdensburgh and Lake Champlain railroad.

And the plaintiff also shows that neither the said defendant corporation nor the said Smith and Stark ever carried out the said contract "A," according to its terms; nor did the said defendant ever advance or lend to Smith and Stark the sum of $600,000, or any other sum in money, to be expended in purchasing the boats and property of the Northern Transportation Company, as agreed to be done in contract "A." Instead of this, the defendant corporation placed in the hands of said Smith and Stark its eight per cent. bonds to the amount of $600,000, for which the said Smith and Stark agreed to allow a premium of four per cent., or a sum equal to $624,000,
68 and also agreed to buy and, as the plaintiff is informed and believes, did buy of said defendant (as a part of said transaction) 470 shares of the Northern Transportation Company's capital stock at the rate of $20 per share, thereby reducing the amount actually furnished them by said defendant (if its bonds were then worth par) to the sum of $566,600, and rendering the said Smith and Stark accountable to the parties of the third part in said contract for the sum of $33,400, and interest thereon ever since at the rate of

eight per cent. per annum, or else relieving altogether the said parties of the third part from all accountability whatever under the said contract "A" for the repayment to said defendant of $600,000.

And the plaintiff says that if the said Smith and Stark were entitled to accept of said defendant corporation its twenty-year bonds in lieu of the money to be advanced by it under said contract "A" (as is denied), neither this plaintiff nor any parties of the third part are accountable under said contract "A" for the repayment to said fourth party of any greater sum or sums than were actually realized in money from said eight per cent. bonds so taken by them, with eight per cent. interest thereon, whatever that sum may be. And this plaintiff is ignorant how much money was realized by said Smith and Stark upon said bonds, and has no means of ascertaining this fact, except through an accounting by said Smith and Stark; and the plaintiff says that such an accounting ought to be had before the defendant corporation is allowed to prosecute further its said bill in equity now pending against this plaintiff.

And the plaintiff further says that the proceeds of said eight per cent. bonds of the defendant corporation went into the hands of said Smith and Stark, as trustees, for the purchase of said boats and property, and they purchased the said boats and property, and acquired the control and management of said Northern Transportation Company, and actually operated the same for several years, and thereby became accountable both to the said defendant corporation and to the parties of the third part to contract "A" for the faithful administration of their said trust, and for the income or earnings of the property so purchased; but that no such account has ever been rendered by them or required of them by the defendant corporation, or by any one, so far as known to this plaintiff.

And the plaintiff further shows that the said Smith and Stark, or the said Stark alone acting in behalf of the parties of the
69 third part in contract "A," and from funds belonging to them, had, prior to 1875, and without the knowledge of this plaintiff, paid to the defendant corporation, and into the sinking fund provided for by article 5 of said contract, larger sums than said defendant was entitled to receive under said contract, and had so paid in behalf of this plaintiff larger sums than it was bound to contribute, if, as this plaintiff is advised and believes, its liability to contribution towards the sum to be raised under said contract was limited to the fund or amount of all gross receipts by its road from the transportation of frieght and passengers brought to Ogdensburgh by the steamers of the Northern Transportation Company, after deducting from said gross receipts the sums required for the payment of car service and in loading and unloading of such freights, and for the drawbacks or allowances made to the upper roads, so called, under contracts existing prior to the execution of contract "A," as provided in and by a certain supplemental contract, dated August 29, 1871, and hereby referred to.

And the plaintiff says that the said Smith and Stark, or Stark alone, or the receivers of the Vt. Central railroad, or both, became accountable to this plaintiff for all such over-payments so made or

required to be made by them of the funds of this plaintiff, and would still remain so accountable but for the release executed by the defendant corporation to them, hereinafter referred to.

And the plaintiff further shows that the said Smith and Stark were also accountable to it, as well as to the defendant corporation, under contract "A," for the faithful and judicious administration by them of the trust confided to them in and by said contract "A," including the appropriation of all sums of money which came into their hands as receipts or income from the operation of said steamboats, or otherwise, by reason of said contract.

And the plaintiff further shows that the said Smith and Stark continued in the management of said Ogdensburg & Lake Champlain railroad under the lease of said road, above mentioned, after the boats had been taken off the line, and until the appointment of a receiver of said railroad on the suit or application of the defendant corporation; and that by one of the clauses of the instrument of February 24, 1870, section 8, under which the lower roads became interested in said Ogdensburg lease, it was provided that said con-
70 tract or lease (of the same date) should not be modified, changed or abrogated without the consent of the lessees or the receivers and managers, without the prior written consent of this plaintiff corporation, and of the other corporations constituting the line from White River Junction to Boston; and the instrument containing this clause was held by said defendant as collateral security for the performance by the lessees of the terms of said lease from the time of its execution until the 17th day of March, 1877.

And the plaintiff further shows that on or about the 17th day of March, A. D. 1877, the defendant corporation and the receivers and managers of the Vt. Central and Vt. & Canada railroads entered into a certain agreement in writing, termed a memorandum of settlement, with each other, whereby the lease of said Ogdensburg railroad was terminated as of some day in October, 1876, without the prior written consent of this plaintiff; and by the said memorandum of settlement, signed by said defendant corporation, it was also provided as follows, viz:

"The Ogdensburgh & Lake Champlain Railroad Company hereby release and discharge the Vt. Central and the Vt. & Canada railroads, and the managers thereof, past and present, and J. G. Smith, and George Stark, named as trustees therein, from all claims under the boat contract (so called, meaning contract "A"), and from all liability to contribute to the sinking fund provided for in said contract, agreed to indemnify said roads and managers against all claims that can or may be made against them by the Northern, Lowell & Nashua and Lowell & Boston railroads, in respect thereto, growing out of any recovery against or payment by said last-named parties, by or to said Ogdensburgh & Lake Champlain Company, or any other party in priority with said last-named company."

And the plaintiff further says that the said Smith and Stark, after using the funds placed in their hands in the purchase of the boats of the Northern Transportation Company, and were in the receipt of the earnings of said boats as trustees under said contract

"A" to the end of the year 1874, and, as such trustees, were bound to apply the net earnings or income derived from the said boats to the repayment of the sums borrowed by or advanced to them by the defendant corporation; and that during said four years' operation of said boats very considerable sums were received by them as and for such net earnings or income of said boats, from time to time,

71 which they were bound by said contract "A" to use and apply in the first instance in repayment or reduction of the advances made to them by said defendant corporation, but failed so to apply, and thus became accountable therefor secondarily, to this plaintiff and its associates, parties of the third part, and would have still remained so accountable but for the release of March 17th, 1877, above mentioned.

And the plaintiff says that by such release the defendant corporation had become disabled or estopped from making any claim against this defendant and its associates for so much of its unpaid loan as is equal to the income of the boats at any time in the hands of said Smith and Stark, and applicable to the reduction of its loan, from the payment of which they were so released by the defendant.

And this plaintiff prays that before further proceedings are had in the suit of said defendant in this court an account may be taken of the amount of income from said boats in the hands of the said Smith and Stark at any time prior to March 17, 1877, when it was so relinquished to them by the said defendant—the said income in the hands of said trustees being, as it avers, the fund primarily chargeable with the repayment of the sums loaned by defendant, and this plaintiff and its associates being liable under said contract to the defendant only for the remainder of such debt as might be found due to defendant after all the funds and securities in the hands of the said Smith and Stark, trustees, has been first exhausted and applied to such reduction.

And the plaintiff says it is informed and believes, and therefore avers, that the gross receipts or earnings made on the road of this plaintiff company from all freight and passengers brought to it and the upper roads by means of the boats of the Northern Transportation Company, after deducting the necessary charges for car service and handling, etc., payable thereon to the roads situated westerly of White River Junction, were as follows:

$4,789.12 on acc't of freights, and
106.74 " passengers, or,

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in all, $4,895.86, and no more; and that said sum was the limit of the liability of this plaintiff company to contribute to the repayment of the funds advanced or loaned to the said Smith and Stark under the said contract "A."

And this plaintiff says that if it be credited with 31 per

72 cent. of all sums paid out by itself and its associate or co-partner, the Boston & Lowell Railroad Company, as contributions to the repayment of said defendant's loan or advances under said contract, it will be found that such payments on behalf of this plaintiff, so made, were largely in excess of this plaintiff's liability for

such contribution under said contract, and that if any of the parties of the third part in said contract are in default, it is not the plaintiff but the receivers and managers, who have been fully relieved and exonerated therefrom by the said defendant corporation itself; so that such default or deficiency cannot be imputed or made chargeable to this plaintiff by said defendant.

And the plaintiff says that, together with the other lower roads, it was interested jointly with the receivers in the lease of defendant's road, dated Feb. 24, 1870, as aforesaid, and was entitled to share in the possession and management of said road, and to use the same as a feeder to its own railroad, this being the motive of the plaintiff in becoming a party to said lease; and that to protect itself and the other lower roads in the enjoyment of this right, it was provided in said instrument of February 24, 1870, that said lease should not be modified or abrogated without the consent in writing of the said lower roads being first obtained; and yet, the defendant, well knowing this fact, procured the said lease to be terminated or abrogated by said receivers, without the consent in writing of said lower roads, and paid them as a consideration therefor the sum of $50,000, and undertook to protect said receivers against all responsibility or accountability to the said lower roads for this breach of their contract, and to indemnify them against all claim therefor on the part of said lower roads.

And the plaintiff insists that the defendant thereby not only cut off any claim against the lower roads for any sums due or payable to it under said contract "A" from said lower roads jointly with said receivers and managers, released by them on the said 17th day of March, 1877, but that if said defendant then had any such joint, or joint and several claims against said receivers and said lower roads in excess of $50,000 in amount, it is bound to apply or account for said sum of $50,000 so paid over to said receivers in reduction to that extent of any such claim, and thus to account to said lower roads (including this plaintiff) for the injury sustained by them by reason of the abrogation of said lease as aforesaid, in breach of the said agreement.

73 And the plaintiff shows that the receivers and managers, at the time of abrogating and terminating said lease and obtaining the release and indemnity aforesaid, from the defendant corporation, fully understood and believed that said defendant had thereby precluded itself from making any claim against the lower roads under the boat contract, and that it would not attempt to do so, and, but for such understanding and belief, they would not have yielded up the defendant's railroad so held by them under said lease. And the plaintiff avers that the defendant corporation, after executing the said lease, did not suppose it had or could lawfully make any claim against the lower roads under said boat contract, and that no such claim ever was made so long as the directors and executive officers of said defendant corporation remained the same as at the time of said release of said boat contract, nor until the 8th of December, 1879, when the plaintiff was first notified of such claim. And no suit was brought against this plaintiff until the 18th day of

tract is referred to in the bill of this defendant against the plaintiff pending as aforesaid in this court. And this defendant further admits that it was known to it that the lessees named in said lease were in possession of the Vermont Central, and Vermont and Canada railroads, as trustees or managers, in conformity to some decree of court of which this defendant was not informed. Whether, under the circumstances in which such possession was held, said trustees and managers were personally liable for the payment of the rent of defendant's railroad or said rent was a lien on the roads in their possession is not known to this defendant. At the time of the execution of said lease a written agreement was executed between said trustees and receivers and a part of the whole of the corporations composing the route between Boston and White River Junction, as to the participation by them in the results of the lease of defendant's road and in the payment of the rents secured by such lease, to which written agreement this defendant craves leave to refer for its various provisions.

5th. This defendant admits that a written agreement was executed between the said trustees and managers and the several corporations who were parties to the agreement last above named, by which, as it is informed, the management of this defendant's road should be placed in the hands of an executive committee. This defendant cannot state whether such agreement was known to it at the time the same was made, but it avers that its assent thereto was never asked or required by its terms, and, consequently, that it never had occasion to or did in fact assent to the same. Said agreement is in writing, and for the terms thereof this defendant craves leave to refer; if it be material, requires the production and proof thereof by the complainant.

6th. This defendant has no means of knowing or ascertaining whether the contract marked "A" annexed to its bill of complaint against the plaintiff was or not executed by all the parties thereto before the 29th day of August, 1871.

It believes the same to have been executed by it at or about the day of its date. By reference to an instrument annexed to the deposition of J. G. Abbott (taken, and to be used, in this case) between the three parties to said contract, it would appear by the re-
77 citals thereof that said contract was not executed by at least some of the parties thereto until the said 29th of August, 1871. But this complainant was not a party to said instrument, and cannot state whether said recital is correct or not. The only agreement known to this defendant which was at any time made as to the purchase of the capital stock of the Northern Transportation Company, and as to the advance of funds by this defendant, is contained in said contract, marked "A," annexed to this defendant's said bill. The agreement contained in said contract as to the application of the advances to be made by this defendant to or for the uses of the other parties thereto is the only agreement in relation thereto known to this defendant, and this defendant submits that such application of its advances was substantially controlled by and in the interest of said other parties and not of this defendant. And

this defendant denies that by the terms of said contract it agreed to look for the reimbursement of its said advances only to the contributions from their gross receipts to be made by the third parties to said contract in the manner set forth in plaintiff's bill.

7th. This defendant denies that at the time it executed said contract, marked "A," annexed to this bill, or at any other time, it was known or understood by it that the several corporations, parties of the third part to said contract, had no legal capacity, under the circumstances disclosed by said contract, to make, if they saw fit, purchases of the capital stock of the Northern Transportation Company, referred to in said contract, or to incur liabilities therefor; on the contrary, this defendant, since the filing of plaintiff's bill, has been informed, and believes, that said third parties were advised by counsel learned in the law that their legal power to execute said contract was in all respects clear. No question as to the power of said parties to apply the advances made by this defendant, in the manner described in said contract, occurred to, or was at any time raised, and no illegal application thereof by said third parties could, it is submitted, extinguished this defendant's legal claim upon them for reimbursement.

8th. This defendant admits that it delivered its bonds, to the amount of $600,000, to the parties of the second part to said contract, on their request, pursuant to the terms thereof, at the times and in the manner stated in the depositions of Henry A. Church, its treasurer, which form part of the evidence in the said suit
78 of this defendant against plaintiff, to which depositions it refers. As to the details of the application made by said parties of the second part of the proceeds of said bond, it is not informed so as to state the same with certainty, but it believes that a part or portion thereof was applied to the purchase of the shares of the Northern Transportation Company, in conformity to the provisions of said contract.

9th. At the time of the execution of the contract "A," annexed to this defendant's bill, this defendant had no reason to fear that, unless funds were provided to purchase the boats and shares of said Transportation Company, said boats would be taken off and the business of its road diminished, since its road was then under lease for an unexpired term of 19 years; and although it was known to it that such fears were felt by its lessees, the event, if it had occurred, could have no effect upon this defendant's legal rights. It admits that at the earnest solicitation of the parties of the third part to said contract marked "A," with great reluctance and influenced by the feeling that such event, if it occurred, would affect the pecuniary interests of its lessees, and might to some extent impair their means to perform the covenants of the lease, so far as these means were dependent solely on the traffic of said road, and upon the written statement of the counsel of said parties of the third part, a copy of which is hereto annexed, marked "B," it agreed to to make said advances if the reimbursement thereof was secured to it, and that under these circumstances and with that understanding, it agreed to and did execute said contract.

10th. This defendant admits that instead of advancing the sum of $600,000 in cash under said contract, it, by agreement, delivered to the parties of the second part to said contract its first mortgage sinking fund bonds to that amount, and that it was allowed by said parties a premium of 4 per cent. on said bonds, as stated in the depositions of its treasurer, Henry A. Church, hereinbefore referred to, and forming part of the evidence in the case of defendant against the plaintiff. And it further admits that said parties of the second part did purchase of the defendant, under the power conferred on it by said contract, 470 shares of the said Northern Transportation Company, at the rate of $20 per share.

11th. This defendant, upon information and belief, admits that the proceeds of said bonds on other funds received by said
79 parties of the second part under said contract were, by said parties of the second part, so far as the 470 shares are concerned, invested in the shares of the said Northern Transportation Company, and it believes that other like purchases were made. But the details of the other investments made by the said parties of the second part this defendant has no knowledge or information. This defendant supposes and believes that said parties of the second part obtained a controlling interest in the affairs of said Northern Transportation Company, but as to the duties of said trustees, and whether they have performed the same, this defendant does not know and is not informed.

12th. This defendant is wholly ignorant as to what were the gross receipts of the plaintiff from the business referred to in said contract and so cannot answer whether upon the construction of said contract claimed by the plaintiff there has been paid in its behalf, with or without its knowledge, larger sums than were payable by it under such construction; but it denies that said construction is a legal and true construction of said contract.

13th. This defendant admits that said Smith and Stark continued in the possession of defendant's road, under their appointment as aforesaid, and until about the month of October, 1876, and that the rent reserved in said lease had been for a long time largely in arrears, which arrears amounted to about the sum of about $75,000, and this defendant had instituted legal proceedings to recover possession of its road and property described in said lease, which proceedings were resisted by said parties; whereupon to avoid protracted and expensive litigation, and to obtain the restoration of its property, this defendant entered into a contract in writing, bearing date the said March 17th, 1877, a copy of which contract is annexed to a stipulation filed by this defendant and the plaintiff, in the defendant's said suit against the plaintiff, and this defendant, as to the legal effect and construction of that contract, submits the same to the judgment of the court. And this defendant admits that said contract was executed by it without the prior written consent of the plaintiff or of either of the corporations constituting the third parties to said contract marked "A," annexed to this defendant's said bill.

14th. As already stated, this defendant is wholly ignorant of what the gross receipts or earnings of plaintiff's road from freight
80 or passengers brought to it from or to the boats of the Trans-

portation Company, and therefore cannot state whether the same amounts to $4,895.88, as stated in plaintiff's bill, but it avers and charges that it amounted to a larger sum; and it wholly denies that said sum is the limit of the liability of the plaintiff to the defendant under said contract towards the reimbursement of its advances made as aforesaid.

15th. In answer to the several interrogatories forming part of plaintiff's bill this defendant replies to the first interrogatory, that it does not know and cannot state whether the said lease of its road, and the agreement between the lower parties to participate in the same, and the assignment of said last named agreement to this defendant, were all executed and delivered at the same time, but it believes that the same were agreed upon as part of the arrangement under which said lease was made.

As to the second interrogatory, that this defendant made no agreement as to the mode in which the proceeds of its advances were to be applied by the parties of the second part to said contract, marked "A," except that the purpose of said parties, for whose use said advances were to be made, to apply the same in the manner set forth in said contract was recited in said contract and so known to this defendant.

As to the third interrogatory—as hereinbefore stated, it was not known by the defendant, nor understood by it, that the plaintiff had no legal capacity to comply with any part of the said contract with which it therein covenanted to comply.

As to the fourth interrogatory. This defendant never had occasion to consider the question or to consult counsel either before the 29th of August, 1871, or at any other time, until about the time of bringing its suit, as to the power of said third parties to bind themselves by the covenants contained in said contract, and that if any doubt had existed, or been known to them at the time of making said contract, this defendant would not have become a party thereto.

As to the fifth interrogatory. On the 17th of March, 1877, John C. Pratt not ceased to be president and director of this defendant. During the period when said Pratt was president, to wit, on September 1st, 1875, a demand was made by him on the executive committee, or on the managers entrusted with the control of said
81 road, to comply with the terms of said contract, which claim and the denial thereof is shown by the papers, copies of which are hereto annexed, marked "C. C." No other claim, as this defendand believes, after said refusal was made during the period while said Pratt continued president or director.

As to the sixth interrogatory. This defendant answers that it admits that the boat contract mentioned in the instrument bearing date March 17, 1877, hereinbefore referred to, is the contract, copy of which marked "A" is annexed to defendant's bill against plaintiff, now pending as aforesaid in this court.

In testimony whereof this defendant hath hereto set its corporate seal, and caused the same to be signed in its behalf by Henry A. Church, its treasurer.

OGDENSBURGH & LAKE CHAMPLAIN RAILROAD COMPANY,

[SEAL.] By HENRY A. CHURCH, *Treasurer.*

I, Henry A. Church, on oath depose and say, that I have been the treasurer of the defendant corporation for about seventeen years; that I have read the above answer of said defendant and believe that the facts therein stated are true.

HENRY A. CHURCH.

SUFFOLK, *ss:*

BOSTON, *February 27th*, 1884.

Subscribed and sworn to this day before me. Witness my hand and seal of office.

[SEAL.] MELVILLE M. WESTON,
Notary Public.

82 B.

BOSTON, *Feb.* 15, 1871.

JOHN C. PRATT, Esq.

DEAR SIR: We have been requested by parties in interest to examine the contract between the Ogdensburg, & Lake Champlain railroad and railroads between Rouse's Point & Boston, with the view of forming an opinion as to the duty of the first-named railroad to issue its bonds upon proper security, for the purpose of retaining & increasing the business contemplated under said contract. We have made such examination sufficiently to express our decided judgment that the refusal of the Ogdensburg road as above in the case submitted to us raises questions most serious in their consequences, and possibly involving the release of other parties from the obligations of said contract—a contingency which we think deserves the very careful consideration of those who desire the continuance of said contract. We further think that a reference of the questions submitted to us, to the legal adviser of the O. & L. C. R. R'd will be likely to lead to such action as will render any steps for a solution of the legal relations of the parties unnecessary.

Yours, truly,

J. G. ABBOTT.
JOHN H. GEORGE.

C. C.

BOSTON, *Sept.* 1, 1875.

To the Managers of the Boston & Lowell Railroad Co.:

Please pay to the order of Henry A. Church, treas'r, the amount due Sept. 1, 1875, to the trustees of the sinking fund under the contract of Feb. 24, 1871, between the Northern Transportation Company, the Ogdensburgh & Lake Champlain R. R. Co., the Nashua & Lowell Railroad Co., the Boston & Lowell Railroad Co., the Trustees & Managers Vt. Central & Vt. & Canada railroads, the Northern railroad, J. Gregory Smith, George Stark.

HENRY A. CHURCH,
Treasurer of Trustees of Sinking Fund Ogd'g & Lake Champlain R. R. Co. and Northern Transportation Co. Bonds.

Sept. 1st, 1875, called at the office of the Boston & Lowell Railroad Co. and made formal demand of the manager of the Boston Lowell

railroad aforesaid for the amount due on the above written draft, & was told they had no funds.

JOHN C. PRATT.

83 C. C.

BOSTON, *Sept.* 1, 1875.

Amount due to sinking fund Ogd. & Lake Champlain Railroad and Northern Transportation Co. bonds, viz:

For purchase of Northern Transportation Co. bonds	15,000
" " " Ogd. & L. Champlain sinking fund do.	7,500
" interest (on $132,000 O. & L. C b'ds cancelled for 6 mos. at rate of 6 per cent.)	3,960
	26,460
Due for coupon of Sept. 1, 1875, on Ogd. & L. Champlain sinking fund bonds $46,800 now outstanding	18,720
	45,180

84 *Stipulation. Filed April 23*, 1883.

United States Circuit Court, District of New Hampshire.

OGDENSBURGH & LAKE C. COMPANY
vs.
NASHUA & LOWELL RAILROAD CORPORATION *et al.*

It is agreed that the paper hereto annexed, being a copy of an instrument executed by the plaintiff on the 17th day of March A. D. 1877, may be used in evidence by the Nashua & Lowell R. R Corporation in this case in lieu of the original; if the original would be competent and material evidence in said cause on objection duly taken to the same by the plaintiff.

Said paper annexed is marked Exhibit X for identification.

S. BARTLETT, *for Plaintiff.*

EXHIBIT X.

Memorandum of settlement between the Ogdensburg & Lake Champlain Railroad Company and the Central Vermont Railroad Company, receivers & managers of the Vermont Central and Vermont & Canada railroads.

First. The contract for the use of the Ogdensburg & Lake Champlain railroad, dated February 24th, 1870, between the Ogdensburg & Lake Champlain Railroad Company and the Vermont & Canada Railroad Company and the trustees and managers of the Vermont Central and the Vermont & Canada railroads is to be treated as and is hereby terminated as of the day the receivers of the Ogdensburg & Lake Champlain railroad took possession of the same, in October last.

Second. The rents and all other monies due the Ogdensburg & Lake Champlain Railroad Company under the contract aforesaid, up to the time said railroad was taken possession of by said receiver

as aforesaid, and all liabilities under said contract, are hereby
85 fully discharged and released by the Ogdensburg and Lake Champlain Railroad Co. in favor of the Central Vermont Railroad Company, receivers as aforesaid, and all the other parties to said contract, and the Ogdensburg and Lake Champlain Railroad Company are to pay the Central Vermont Railroad Company fifty thousand dollars, in three equal installments, on six, eight, and ten months from date, in notes without interest, which is to be in full for all claims for improvements made to the road and property of said Ogdensburg and Lake Champlain Railroad Company while in the possession of said receivers and managers under said contract.

Third. The supplies and materials purchased by W. J. Averill, as receiver of said Ogdensburg & Lake Champlain railroad, as inventoried by Mr. Andrews and Mr. Hobart, are agreed upon at eighty-four thousand dollars. The payments made by said receiver on the same, including car service of all Ogdensburg and Lake Champlain Railroad Company's cars in the hands of the Central Vermont Railroad Company, as receiver, since said Averell took possession as aforesaid, including those not delivered as well as those delivered to the said Averill, receiver, are to be applied toward said supplies. The balance due for supplies and material, as aforesaid, is to be assumed and paid on demand by the Ogdensburg and Lake Champlain Railroad Company.

Fourth. The rolling stock of the Ogdensburg and Lake Champlain Railroad Company now in the possession of the Central Vermont Railroad Company, receiver, &c., is to be surrendered without delay, and the Ogdensburg and Lake Champlain Railroad Company release all claims of their own, and agree — indemnify the Central Vermont Railroad Company, receiver, against all claims of the said Averell, receiver, for the detention of the same, except the car service aforesaid.

Fifth. The Ogdensburg and Lake Champlain Railroad Company hereby release and discharge the Vermont Central and the Vermont and Canada railroads and the managers thereof, past and present, and J. G. Smith and George Stark, named as trustees therein, from all claims under the boat contract, so called, and from all liability to contribute to the sinking fund provided for in said contract, and agree to indemnify said roads and managers against all claims that can or may be made against them by the Northern, Lowell & Nashua, and Lowell & Boston railroads in respect thereto,
86 growing out of any recovery against or payment by said last-named parties, by or to said Ogdensburg & Lake Champlain Railroad Company or any other party in privity with said last-named company.

Sixth. Business contracts made prior to this date by the Central Vermont Railroad Company for the transportation of freight and passengers over the Ogdensburg and Lake Champlain railroad are to be carried out by the Ogdensburg and Lake Champlain Railroad Company, so far as their road is concerned, at such rates as may be agreed upon, or, in the absence of such agreement, not to exceed local rates as established by their tariff of March 3, 1877. The con-

tract heretofore made by the Central Vermont Railroad Company with the Northern Transit Company for traffic over the Ogdensburg and Lake Champlain railroad is to be carried out, and the rates of division of freight earned under said contract east of Ogdensburg shall be *pro rata* and the terminal charges to be as now in force.

Seventh. The first action brought in the supreme court of the State of New York by the Ogdensburg & Lake Champlain Railroad Company against the Vermont & Canada Railroad Company, John G. Smith, and other managers, &c., the Central Vermont Railroad Company and John Schrier, for the recovery of the possession of the Ogdensburg & Lake Champlain railroad, on the ground of the invalidity of the agreement of February 24, 1870, is hereby discontinued without costs to either party, all appeals thereon withdrawn, and satisfaction of the judgment for costs therein in favor of the defendants, or any of them, to be entered of record.

The demurrer and appeals on the part — the defendants in the second action brought by said Ogdensburg & Lake Champlain Railroad Company against said Vermont and Canada Railroad Company, John G. Smith, Clark and Cheney, and the Central Vermont Railroad Company, in which the receiver was appointed, are hereby withdrawn, and the plaintiff may forthwith take judgment thereon for the recovery of the possession of said railroad and property without costs and without damages of any kind whatsoever against any of the defendants; the defendants therein to waive all right to notice of settlement of the accounts of the receiver in said action.

87 Such stipulation as may be necessary to carry out this provision shall be executed by the attorneys of the respective parties in said action.

The suit in the State of Massachusetts in favor of said Ogdensburg and Lake Champlain Railroad Company against Benjamin P. Cheney and others, for the cars and other property of said Ogdensburg & Lake Champlain Railroad Company, shall be discontinued without costs or damages to either party.

Such further instruments or writings as may be necessary to carry out this agreement shall be executed when required.

In witness whereof, the said Central Vermont Railroad Company, as receiver and manager, acting herein by James R. Langdon, its committee-man for that purpose, duly authorized by vote of the directors of said company, and the Ogdensburg & Lake Champlain Railroad Company, acting herein by Samuel M. Felton, its committee-man for that purpose, duly authorized by vote of the directors of said company, have, this seventeenth day of March, A. D. 1877, respectively set the names of said company.

CENTRAL VERMONT RAILROAD CO.,
Receivers and Managers,

(Sig.) By JAMES R. LANGDON.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD CO.,

(Sig.) By S. M. FELTON.

A true copy. GEO. T. CHILDS.

88 Circuit Court United States, District of New Hampshire.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD COMPANY
vs.
NASHUA & LOWELL RAILROAD COMPANY.

It is agreed between the parties as follows:

1st. That the several papers, depositions, and laws which are to be printed and used as evidence by stipulation between the parties in the case of the plaintiff against the Boston and Lowell Railroad Company, pending in this court for the district of Massachusetts (which case is agreed to be heard in said court at the same time with this cause), be taken and used as evidence in this cause, and need not be printed for the purposes of a hearing.

2nd. That the stipulation between the parties to this cause in relation to the use of a letter, signed by John C. Pratt, president, dated November 9th, 1871, together with said letter, be printed with the record for the purposes of hearing, and also the deposition of J. Gregory Smith.

3rd. That replications to the answers of the several defendants, where the same have not been filed, should be deemed to have been filed.

4th. That this cause be now set down for hearing, and that the cross-bill and answer be printed and made part of the record.

Nothing herein contained shall be taken as a waiver by defendant of the objection set forth in its answer to plaintiff's bill of complaint that the Nashua & Lowell Railroad Corporation never became a party to contract A, or bound thereby in law.

April 8th, 1884.

S. BARTLETT, *For Plaintiff.*
NASHUA & LOWELL RAILROAD CORPORATION,
By its Solicitor, F. A. BROOKS.

BOSTON, *Nov.* 9, 1871.

Gen. GEO. STARK, *Trustee, &c.*

DEAR SIR: I have your favor of the 8th, and in reply beg to say that I understand the contract as you do.

In addition thereto it was understood, as the latter part of your letter implies, that the proceeds of our bonds were to be applied to the payment of all the debts of the N. T. Co., with the exception of the funded debt of $400,000, which amount was provided for by the sinking fund. (You think the understanding was that
89 $500,000, or a sum not exceeding that, should remain.) It was also understood that Judge James was to see that the money was so applied, and he was selected by Gov. Smith and yourself for that purpose.

I was aware that the proceeds of our bonds was to be applied first to the purchase of stock in the N. T. Co., and the proceeds of such purchase applied, as you say, to the payment of the debts of the N. T. Co.

My letter, I am aware, simply asked for information as to the ap-

plication of the proceeds of our bonds towards the payment of the debts of the company. I might have asked if such proceeds, first used for the purchase of the stock, had then been applied to the debts of the company. I did not mean to imply by my inquiry that we feared or suspected any misapplication of the funds; but as you are aware that it was with considerable reluctance that we issued the bonds, and a very important item of the security upon which we relied was the stock of the N. T. Co. held by yourself and Gov. Smith, as trustees, free from all debts except the funded debt, it is reasonable and proper that we should want the information asked for, and which you have given us in the statement, that the debts of the N. T. Co. have been paid off, all but $500,000.

I understand this includes the bonded debt of $400,000. If I am wrong, please correct me.

Yours, very respectfully,

JOHN C. PRATT *Pres't.*

Circuit Court of the United States, District of New Hampshire.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD COMPANY *vs.* NASHUA & LOWELL RAILROAD COMPANY *et al.* } In Equity.

It is agreed that the second stipulation between the above-named parties, found on page 91 of the printed record, in the suit of pl'ff against the Boston & Lowell R. Co., Mass. district, be altered so as to read as follows:

Second. "And it is further stipulated that the plaintiff's claim as to the continuance of gross earnings made in the bill is to be limited to the close of the business of said Transportation Company for the year 1874, after which time the boats of the Transportation Company passed into the hands of a receiver."

NASHUA & LOWELL R. R CORPORATION,
By F. A. BROOKS, *Solicitor.*
S. BARTLETT, *For Pl'ff.*

90 *Stipulation. Filed Ap.* 23, 1883.

U. S. Circuit Court, District of New Hampshire.

OGDENSBURG & LAKE C. RAILROAD COMPANY
vs.
NASHUA & LOWELL R. R. CORPORATION & *al.*

It is agreed that the letter of the president of the plaintiff corporation to George Stark, trustee, &c., one of the defendants, dated Nov. 9, 1871, hereto annexed, may be used in evidence by the defendants in this case, if said letter would be competent and material evidence in said cause, on objection duly taken to the same by the plaintiff.

S. BARTLETT, *For Pl'ff.*

Apr. 23, 1883.

BOSTON, *Nov. 9th*, 1871.

Gen. GEO. STARK, *Trustee, &c.*

DEAR SIR: I have your favor of the 8th, and in reply beg
91 to say that I understand the contract as you do.

In addition thereto it was understood, as the latter part of your letter implies, that the proceeds for our bonds were to be applied to the payment of all the debts of the N. T. Co., with the exception of the funded debt of $400,000, which amount was provided for by the sinking fund. (You think the understanding was that $500,000, or a sum not exceeding that, should remain.) It was also understood that Judge James was to see that the money was so applied, and he was selected by George Smith and yourself for that purpose.

I was aware that the proceeds of our bonds was to be applied first to the purchaser of stock in the N. T. Co., and the proceeds of such purchase applied, as you say, to the payments of the debts of the N. T. Co.

My letter, I am aware, simply asked for information as to the application of the proceeds of our bonds towards the payment of the debts of the company. I might have asked if such proceeds, first
used for the purchase of the stock, had then been applied to
92 the debts of the company. I did not mean to imply by my inquiry that we feared or suspected any misapplication of the funds; but as you are aware that it was with considerable reluctance that we issued the bonds, and a very important item of the security upon which we relied was the stock of the N. T. Co. held by yourself and Gov. Smith, as trustees, free from all debts except the funded debt, it was reasonable and proper that we should want the information asked for, and which you have given us in the statement, that the debts of the N. T. Co. have been paid off, all but $500,000. I understand this includes the bonded debt of $400,000. If I am wrong, please correct me.

Yours, very respectfully,

JOHN C. PRATT, *Pres't.*

Filed Ap'l 23, 1883.

93 *Stipulation.*

U. S. Circuit Court, District of New Hampshire. May Term, 1884.

OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD CO.

v.

NASHUA & LOWELL R. R. CORPORATION & *al.*

It is agreed that the document hereto annexed contains the charter and acts of the Legislature of New Hampshire, incorporating the Nashua & Lowell Railroad Corporation, and that the same may be filed and used in evidence in this cause without formal proof.

S. BARTLETT,
For Complainant.

Filed Aug. 30, 1884.

94 *Laws of New Hampshire relating to the Nashua and Lowell Railroad Corporation.*

Laws of 1835, Chapter 37.

An act to incorporate the Nashua and Lowell Railroad Corporation.

SECT. 1. Be it enacted, etc., That Jesse Bowers, Ira Gay, Daniel Abbot, Benjamin F. French, John M. Hunt, Peter Clark, and Charles J. Fox, their associates, successors, and assigns, be and hereby are constituted and made a corporation by the name of the Nashua and Lowell Railroad Corporation, and by that name may sue and be sued, prosecute and defend to final judgment and execution, and may have and use a common seal, and the same may alter and renew at pleasure; and may also make, ordain, and put in execution such by-laws and regulations (not being contrary to the constitution and laws of this State) as shall be necessary, proper, and convenient for the government of said corporation, the due management of its concerns, and the preservation and proper use of said railroad; and shall be, and hereby are, vested with all the powers and privileges, and subject to all the liabilities, which by law are incident to corporations of a similar nature.

SECT. 2. That said corporation be, and hereby is, empowered to locate, construct, and keep in repair a railroad from any point in the southern line of the State to some convenient place in or near Nashua village, in Dunstable, in such manner as they shall deem most expedient, and to take toll for all passengers and property of all descriptions conveyed upon the same or any part thereof; and for this purpose may lay out said railroad, not exceeding six rods wide, and may take as much more land as may be necessary for stone and gravel for embankments, cuttings, walls, bridges, and abutments for the proper construction of said railroad: Provided, That all damages occasioned by taking the same shall be determined in the manner hereinafter provided; and that the transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road shall be in conformity to such rules, regulations, and provisions as the directors shall, from time to time, prescribe and direct.

SECT. 3. That said corporation be and is hereby authorized, for the purposes aforesaid, to purchase, take, hold, improve, and convey real and personal estate of every kind, and to erect thereon such depots, storehouses, toll-houses, and other buildings as they may think expedient, to such amount as they may find sufficient for the completion of said railroad and the management of its concerns: Provided, Said amount shall not exceed three hundred thousand dollars.

SECT. 4. That the said Jesse Bowers, Daniel Abbot, and Ira Gay, or any two of them, may call the first meeting of said corporation by giving to each of the members seven days' previous notice, at which meeting a clerk shall be chosen, who shall be sworn to the faithful discharge of the duties of his office, and it shall be his duty

to record the doings and proceedings of said corporation, and to perform such other services as the by-laws of said corporation may require. And at the same or any subsequent meeting duly holden, the members of said corporation may prescribe the time and manner of calling, holding, and managing future meetings; may divide the capital stock, or such portion thereof as they shall deem sufficient for the time being, into shares, and prescribe the mode in which the same shall be holden and transferred; may make or provide for the making of assessments on said shares, from time to time, as occasion may require, provided that assessments shall not exceed in the whole the sum of twenty-five dollars on each share, and fix the time and mode of payment; may appoint and constitute such officers, servants, or agents of the said corporation as they shall think expedient, and prescribe their respective duties and powers; and may do or transact any other matter or thing relating to the property, business, or concerns of said corporation. And each member shall be entitled to one vote for each share he owns or holds in said corporation, and absent members may be represented and vote by proxy, authorized thereto by writing, filed with the clerk of said corporation; and all questions shall be decided by a majority of votes cast: Provided, That no vote shall be given by any proprietor for any share owned or held by him exceeding one-tenth of the whole number of shares.

SECT. 5. That the shares aforesaid shall be liable and holden for the payment of all assessments legally made thereon; and in case of the neglect or refusal of any member to pay the assessment or assessments on his share or shares, the same or so many of them as may be sufficient to pay the amount of such assessments, with interest and expenses of sale, may be sold and transferred for the payment of the same, in such manner as may be prescribed by the by-laws of said corporation: Provided, That if it be necessary to raise a sum exceeding twenty-five dollars on each share, the same shall be done by creating new shares.

SECT. 6. That when the lands or other property of any feme covert, infant, spendthrift, or person *non compos mentis*, shall be necessary for the construction of said railroad, the husband of such feme covert, or the guardian of such infant, spendthrift, or person *non compos mentis*, may release all damages for any land or property taken and appropriated as aforesaid, as fully as they might do if the same were holden in their own rights respectively.

SECT. 7. That said corporation shall be holden to pay all damages, arising to any person or corporation by taking their land for said railroad, when it cannot be obtained by voluntary agreement, on petition to the court of common pleas, in the mode provided by law for the recovery of damages, occasioned by the laying out of highways by order of said court.

SECT. 8. That said corporation be and hereby is authorized to cross any canal, or to cross, raise, lower, or run along any turnpike, highway, or other way; provided said railroad shall be so constructed as not to obstruct the safe and convenient use of the same; and if said railroad shall not be so constructed, the proprietors of such canal

or turnpike, the owner of such private way, or the selectmen of the town in which such highway may be situated, as the case may be, shall be entitled to an action on the case against said corporation, and may recover reasonable damages: Provided, however, That the proprietors, owners, or selectmen aforesaid, as the case may be, shall, before action brought, file with the clerk of said corporation a particular description in writing signed by them, of all such alterations as they may deem necessary, and shall specify therein, and allow a reasonable time to said corporation for making said alterations: And provided further, That not action shall be sustained as aforesaid unless brought within one year after the time allowed for making such alterations shall have expired.

SECT. 9. That said corporation shall substantially construct
96 and keep in good repair all bridges, abutments, foundations, walls, and embankments, which may be necessary for safely and conveniently crossing any canal, or crossing, passing over, under, or along any turnpike, highway, or other way; and when any public highway shall hereafter be laid out by the selectmen of any town, or by order of the court of common pleas, across said railroad, said corporation being thereto required in writing by the selectmen of the town where such highway may cross said railroad, shall make such alterations in said railroad as may be necessary to the proper construction of said highway, and the convenient and safe use thereof, and the same constantly maintain and keep in repair; and in default thereof shall be liable in damages to the party injured, and also to prosecution by indictment and fine, to the use of the county wherein such default may take place, at the discretion of the court before whom the same may be tried.

SECT. 10. That no other railroad shall be granted, within thirty years from the completion of the railroad granted in this act, running parallel with, or which is a substitute for the same, or any part thereof, within five miles of the same: Provided, however, That any railroad may be granted running to meet the railroad granted in this act at its termination, anything herein contained to the contrary notwithstanding: And provided further, That if the location of said railroad be not filed with the secretary of State on or before the first day of July, in the year of our Lord one thousand eight hundred and thirty-six, or of said railroad shall not be commenced, and the sum of four thousand dollars have been laid out and expended on the same, within three years from and after the passage of this act, or if the same shall not be completed so that passengers and property may and shall be conveyed on the same within five years from this time, then this act shall be null and void.

SECT. 11. That if any person shall wilfully, maliciously, or wantonly, and contrary to law, obstruct the passage of any engine or carriage upon said railroad, or in any way injure or destroy said railroad or any part thereof, he, she, or they, or any person aiding or abetting in such trespass, shall forfeit and pay to said corporation for every such offence treble such damages as shall be proved, to be sued for and recovered before any court proper to try the same. And such offender shall be liable to indictment, by the grand in-

quest for the county in which such trespass shall have been committed, for any offence aforesaid; and on conviction thereof shall pay a fine not exceeding five hundred dollars, nor less than thirty dollars, for the use of said county, or may be imprisoned for a term not exceeding one year, at the discretion of the court before whom such conviction may be had.

SECT. 12. That said corporation be, and hereby is, authorized to extend said railroad, from its termination at the southern line of this State into and through the Commonwealth of Massachusetts, to meet the Boston and Lowell railroad, whenever said Commonwealth will empower said corporation so to do, with such powers, liabilities, and restrictions as may be deemed expedient; and for this purpose said corporation may increase their capital stock and create new shares, as said Commonwealth may authorize them to do.

SECT. 13. That the Legislature may authorize any company to enter with another railroad at the termination of said Nashua and Lowell railroad, at Nashua village in said Dunstable, or between the factories of the Jackson Company in said Dunstable and Merrimac river, paying for the right of using the same or any part thereof such a rate of toll as the Legislature may from time to time prescribe, and complying with such rules and regulations as
97 may be established by said Nashua and Lowell Railroad Corporation; and that it shall be the duty of the directors of said company, from year to year, on or before the second Wednesday of June, verified by the affidavit of at least two of them, to make a report to the Legislature of their acts and doings, receipts and expenditures, under the provisions of this act, and their books shall at all times be open to the inspection of any committee of the Legislature appointed for that purpose. And if said corporation shall unreasonably neglect or refuse to make such report, at the expiration of every year after the opening of said railroad, for every such neglect or refusal they shall forfeit and pay to the use of the State a sum not exceeding five thousand dollars, to be recovered by action or indictment in any court of competent jurisdiction.

SECT. 14. That if, after the expiration of five years from and after the completion of said road, the net income or receipt from tolls and other profits, taking the five years aforesaid as the basis of calculation, shall have amounted to more than ten per cent. per annum upon the cost of the road, the repairs and all expenses incident thereto, the Legislature may take measures to alter and reduce the rate of tolls and other profits in such manner as to take off the overplus for the next five years, calculating the amount of transportation upon the road to be the same as the five preceding years, and at the expiration of every five years thereafter the same proceedings may be had: Provided, That it shall be in the power of the State, at any time during the continuance of the charter hereby granted, after the expiration of twenty years from opening for use of the railroad herein provided to be made, to purchase of the said corporation the said railroad, and all the franchise, property, rights, and privileges of said corporation, by paying to said corporation a sum equal in amount to their capital expended, with such further sum,

after deducting the net income by them received, as shall make their net income equal to ten per cent. on said capital annually.

SECT. 15. That nothing in this act contained shall prevent the Legislature from granting any charter, for a company to construct a railroad commencing at the southerly line of the State, in either of the towns of Hudson, Pelham, or Salem, to run thence northwardly to Concord; provided such railroad shall be laid out and constructed on the east side of Merrimac river, as far northwardly as Amoskeag village, in Goffstown.

SECT. 16. That nothing in this act shall be so construed as to affect the rights of any railroad corporation heretofore granted, and that the Legislature of this State may at any time hereafter alter, amend, or modify this act or any of its provisions. Approved June 23, 1835.

Laws of 1838, *Chapter* 21.

An act to unite the Nashua and Lowell Railroad Corporations of Massachusetts and New Hampshire, and for other purposes.

SECTION 1. Be it enacted, etc., That the two corporations, under the name of the "Nashua and Lowell Railroad Corporation," one of which charters was granted by the Legislature of this State, the twenty-third day of June, one thousand eight hundred and thirty-five, and the other by the Legislature of the Commonwealth of Massachusetts, the sixteenth day of April, one thousand eight hundred and thirty-six, are hereby authorized, from and after the time when this act shall take effect, to unite said corporations, and all the tolls, franchises, rights, powers, privileges, and property of the said two corporations shall be held and enjoyed by the stockholders in each and both in proportion to their number of shares therein.
98 And from and after the time said corporations shall be united, all property owned, acquired, or enjoyed by either of said corporations shall be taken and accounted to be the joint property of the stockholders, for the time being, of said two corporations.

SECT. 2. That from and after the time said corporations shall be united, all the stockholders shall be entitled to the same notice, and shall enjoy the same right of voting. And all meetings shall be warned and held by the associated stockholders, pursuant to the by-laws of said corporations, and such meetings shall be legal to choose all officers of said corporation, and to transact any other business which other railroad corporations might of right do: Provided always, That there shall be at least one officer in each State, who is an inhabitant thereof, on whom process against said corporation may be served, and that the books and registry of one corporation shall be taken to be the books and registry of the other corporation.

SECT. 3. That the share or shares of any stockholder in said company shall be liable to attachment and execution, in the State where such stockholder, at the time of such attachment or execution, shall reside or inhabit: Provided always, That a true and attested copy of such attachment or execution shall be left, at the time of service,

by the officer serving the same, with the clerk, or any director of said corporation, or at his usual place of abode, in the State where such attachment or execution shall be served.

SECT. 4. That the said corporation shall keep separate accounts of the expenses which have arisen, or shall arise, in construction of the portions of said railroad, situated in the States of Massachusetts and New Hampshire, respectively, and of all the expenses which would have properly belonged to the respective corporations, as if this act had not been passed, until the same shall be completed in both States. And there shall be two commissioners appointed, who shall hold their offices for the term of four years, whose duty it shall be to ascertain what proportion of the expenditures on said railroad, and of the other expenses attending its construction and maintenance, also what proportion of the receipts and profits of said railroad shall properly appertain and belong to the portions of said railroad situated in said two States. And the annual report, which shall be made to the Legislature of this State, in pursuance of the laws of this State relating thereto, shall be approved by said commissioners. And the Governor of each of said States shall appoint one commissioner, who shall execute the duties prescribed by this act, and who shall receive from said corporation a reasonable compensation for their services.

SECT. 5. That whereas the Legislature of the Commonwealth of Massachusetts have passed a subsisting act, substantially similar, uniting said two corporations, this act shall be in force when the same shall have been accepted by the stockholders of each and both said corporations, at a meeting to be called for that purpose; at which meeting said stockholders may vote to ratify and render valid, in the united corporations, all former proceedings, which would have been valid in said corporations, respectively; and the same shall be as binding on the united corporations as if adopted separately by each.

SECT. 6. That the said corporation, so far as their road is situated in this State, when united by virtue of the provisions of this act, shall be subject to the general laws of this State, to the same extent as said corporation would have been if this act had not been passed.

SECT. 7. That after said corporations shall be united, according to the provisions of this act, they shall be one corporation by
99 the name of the Nashua and Lowell Railroad Corporation. And all the acts of said corporations, which are valid in said corporations severally, shall be valid in the united corporation.

SECT. 8. That said corporation shall have power, and they are hereby authorized, to alter and amend the location of their road, so far as the same lies north of Nashua river, subject to all the liabilities contained in their original charter; provided, such location be made, and such amended alteration filed in the office of the secretary of State on or before the first day of September next. And so much of the tenth section of an act entitled "An act to incorporate the Nashua and Lowell Railroad Corporation," as requires the filing of the location of their road with the secretary of State on or before the first day of July, A. D. 1836, shall be, and is hereby repealed,

so far as relates to that portion of said road lying north of Nashua river, as before mentioned.

SECT. 9. That the Legislature of this State, may at any time hereafter so alter, amend, or modify this act, or any of its provisions, as the public good may require.

Approved June 26, 1838.

100 *Pleadings and Evidence.*

Circuit Court of the United States, District of Massachusetts. In Equity.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY, Complainant,
v.
BOSTON AND LOWELL RAILROAD CORPORATION *et al.*, Defendants. } No. 1373.

S. Bartlett, F. W. Palfrey, for complainant.
Abbott & Lovering, for Boston & Lowell R. R. Corp'n.
J. H. Benton, Jr., for Northern R. R. of N. H.
F. A. Brooks for Nashua & Lowell R. R. Co.
Stipulation filed Sept. 16, 1884.

[Endorsed:] Filed Sep. 4, 1884. William H. Hackett, clerk of circuit court U. S., district of New Hampshire.

101 *Stipulation Filed Sept.* 16, 1884.

OGDENSBURG & LAKE C. R. Co.
vs.
NASHUA & LOWELL C. R. Co.

It is agreed between the parties that the following are the papers and depositions, printed and used as evidence in the case of the plaintiff against the Boston and Lowell Railroad Company, pending in this court for the district of Massachusetts, which by the stipulation between the parties hereto filed on the 8th day of April, 1884, are to be used as evidence in this case.

Said papers and depositions begin on the ninetieth page of the record in said case against the Boston and Lowell Railroad Company, and end with the end of that record on page 216.

S. BARTLETT, *for Pl'f.*
F. A. BROOKS,
For Nash. & L. R. Co. Defendant.

102 *Stipulation. Filed May* 18, 1882.

To expedite the hearing of these causes it is agreed:

First. That the amount of gross receipts of each of the parties of the third part under the contract annexed to plaintiff's bill, from passengers, shall for the purposes of these causes be taken and deemed to be as follows; and said sums are to be added to the respective

sums which may be found to have been the gross receipts of each of said parties from freight business:

103 From March 1, 1871, to Aug. 31, 1871.

Northern railroad	$76 76
Boston & Lowell and Nashua & Lowell	42 77
Vermont Central R. R. Co., including Ogdensburg	518 97

From Sept. 1, 1871, to Feb. 28, 1872.

Northern railroad	26 47
Boston & Lowell and Nashua & Lowell	7 21
Vermont Central R. R. Co., including Ogdensburg, etc.	172 96

From March 1, 1872, to Dec. 31, 1872.

Northern railroad	241 34
Boston & Lowell and Nashua & Lowell	123 05
Vermont Central R. R. Co., etc.	940 11

From Jan. 1, 1873, to Dec. 31, 1873.

Northern railroad	175 57
Boston & Lowell and Nashua & Lowell	82 55
Vermont Central R. R. Co., etc.	1,587 50

From Jan. 1, 1874, to Dec. —, 1874.

Northern railroad	179 30
Boston & Lowell and Nashua & Lowell	88 76
Vermont Central R. R. Co., etc.	1,519 68

Second. And it is further stipulated that the plaintiff's right of recovery, if any, in either of said suits is to be limited to the close of the business of said Transportation Company for the year 1874, after which time the boats of the Transportation Company passed into the hands of a receiver.

S. BARTLETT,
For Plaintiff.
J. G. ABBOTT,
For Boston & Lowell R. R. Co.
F. A. BROOKS,
Solicitor for the Nashua & Lowell R. Corp.
J. H. BENTON, Jr.,
For Northern Railroad.

104 *Stipulation. Filed May* 18, 1882.

It is stipulated and agreed as follows, to wit:

First. That H. B. Wilbur and C. S. Mellen shall, from such sources of information as shall be open to them both, proceed together to ascertain and state in accounts made by each of them, the total ton-

nage of freight brought by the boats of the Northern Transportation Company to the line composed of the roads of the parties of the third part to the contract annexed to the plaintiff's bills, or to any roads leased or operated by said parties of the third part, or either of them, from the first day of March, 1871, to the close of business of the Transportation Company for the year 1874, and also the gross receipts therefrom upon said line, and upon any roads so leased or operated, and also the gross receipts of each of the parties of the third part therefrom during said time, and shall also make similar accounts of the freight and the receipts therefrom carried from said roads to the steamers of the party of the first part to said contract, at Ogdensburg, during the same time. Said Wilbur and Mellen shall also state an account together showing the matters and things in which the accounts made by each of them as aforesaid agree, and as to such matters and things such account shall be final and bind the parties for the purposes of these suits only, and they shall also state separately the amounts and details of each of the items or matters in which their said separate accounts differ.

Second. Said account shall be prepared and submitted to the counsel of the respective parties on or before the fifteenth day of September, 1882, to be thereafter filed in court, and the taking of testimony in said cases shall be suspended until after that period.

S. BARTLETT,
For Plaintiff.
J. G. ABBOTT,
For the Boston & Lowell R. R. Co.
F. A. BROOKS,
Solicitor for the Nashua & Lowell R. Corp.
J. H. BENTON, JR.,
For Northern Railroad.

105 *Report of C. S. Mellen Filed Dec.* 27, 1882.

To SIDNEY BARTLETT, counsel for plaintiff; J. G. ABBOTT, counsel for Boston and Lowell R. R. Corp.; F. A. Brooks, solicitor for Nashua and Lowell R. R. Co.; J. H. BENTON, Jr., counsel for Northern R. R.

GENTLEMEN: Mr. H. B. Wilbur and myself have acted under the agreement signed by you and filed in the United States circuit court for Massachusetts May 18, 1882,, and I state the following account as the result of our investigation: I find and report that "the total tonnage of freight brought by the boats of the Northern Transportation Company to the line composed of the roads of the parties of the third part to the contract annexed to the plaintiff's bill, or to any roads leased or operated by said parties of the third part, or either of them, from the first day of March, 1871, to the close of business of the Transportation Company for the year 1874," was 577,584,843 pounds, and that the "gross receipts therefrom upon said line and upon any road so leased or operated" were $1,182,306.30.

That "the gross receipts of each of the parties of the third part therefrom during said time" were as follows:

Boston and Lowell railroad received	$10,659 66
Nashua and Lowell railroad received	4,789 12
Concord railroad received	22,213 40
Northern railroad received	53,125 97
Vermont Central railroad (meaning by that term the the trustees and managers of Vermont Central and Vermont and Canada Railroads)	1,091,518 15

I also find and report that "the amount of freight carried from said roads of the parties of the third part of said contract (*i. e.*, on the Boston and Lowell railroad, the Nashua and Lowell railroad, the Concord railroad, and the Vermont Central railroad) to the steamers of the party of the first part to said contract at Ogdensburg during same time" was 170,740,154 pounds, and that "the gross receipts therefrom upon said line and upon any road so leased or operated" were $290,759.69.

106 That "the gross receipts of each of the parties of the third part therefrom during said time" were as follows, to wit:

Boston and Lowell railroad received	$12,143 99
Nashua and Lowell railroad received	5,455 99
Concord railroad received	4,902 70
Northern railroad received	12,980 91
Vermont Central railroad received	255,276 10

In this accounting the Concord railroad has been treated as though it had executed the contract.

I attacch to this report account marked "A," showing all business brought by the boats of the Northern Transportation Company to the line composed of the roads of the parties of the third part, and account marked "B," showing the business carried to the boats of the Northern Transportation Company by the line composed of the roads of the parties of the third part.

Very respectfully, yours, C. S. MELLEN.

A.—*Gross Receipts from East Bound Northern Transportation Co.'s Business.*

Railroads.	6 months to Sept 1, 1871.	6 months to M'ch 1, 1872.	6 months to Sept. 1, 1872.	6 months to M'ch 1, 1873.	4 months to July 1, 1873.	2 months to Sept. 1, 1873.	6 months to M'ch 1, 1874.	6 months to Sept. 1, 1874.	4 months to Jan'y 1, 1875.	Total.
Ogdensburg & L. C. railroad	106,575 86	77,735 17	56,044 58	74,251 49	39,933 04	44,041 03	64,411 21	52,004 23	42,736 96	557,734 27
Montreal & Plattsburg R. R.	1,231 02	673 29	613 44	962 31	4 91		71 09	71 09	71 09	3,698 24
Whitehall & Plattsburg R. R.	135 23	39 12	58 42	156 76	4 92					394 45
W. Central railroad	86,841 77	66,139 74	43,324 01	61,889 19	32,984 86	35,141 64	48,387 35	46,972 07	33,197 81	454,878 44
Vermont Valley R. R.	546 36	695 27	614 98	610 67	236 24	320 41	541 91	380 51	228 29	4,144 64
Vt. & Mass. R. R.	144 40	203 91	302 04	307 74	129 69	157 04	244 12	117 53	50 35	1,656 82
Rutland R. R.	10,750 47	6,167 56	5,365 03	5,662 92	3,553 02	4,697 33	6,437 [illegible]	7,211 59	5,403 06	55,248 20
Steamer Oakes Ames			66 60	30 90						97 50
Montreal & Vt. Junc. R. R.	18 20	20 67	2 51		16 72	5 79	25 05	4 11	77 85	170 90
Addison railroad				6 21		4 13	9 06	73		20 13
Stanstead S. & C. R. R.							7 57			7 57
Missisquoi R. R.										
Sullivan railroad	1,278 58	1,242 95	774 31	1,066 60	489 30	551 71	914 74	62 43	161 08	223 51
New London N. R. R.	305 61	281 38	1,264 04	977 60	605 42	750 27	795 03	556 47	290 13	7,164 79
	207,827 50	153,169 06	108,429 96	145,922 39	77,958 12	85,669 35	121,844 35	762 28	337 06	6,078 69
								108,143 74	82,553 68	1,091,518 15
Northern railroad	9,623 03	9,429 40	5,224 59	9,380 46	3,946 07	3,969 24	5,486 79	3,525 01	2,541 38	53,125 97
Concord railroad	4,278 46	3,397 32	2,093 38	3,565 89	1,650 32	1,771 06	2,541 70	1,813 24	131 82	22,213 40
Nashua & Lowell R. R.	915 13	1,143 32	586 96	575 08	287 12	190 18	370 45	367 07	353 81	4,789 12
Boston & Lowell R. R.	2,036 90	2,544 82	1,306 46	1,280 02	639 08	423 31	824 54	817 03	787 50	10,659 66
	16,853 52	16,515 07	9,181 39	14,801 45	6,522 59	6,353 79	9,223 48	6,522 35	4,814 51	50,788 15
	224,681 02	169,684 13	117,611 35	160,723 84	84,480 71	92,023 14	131,067 83	114,666 09	87,368 19	1,182,306 30

TONNAGE.

118,715,228 lbs.	6	months	to September 1, 1871.
73,402,874 "	6	"	" March 1, 1872.
55,666,949 "	6	"	" September 1, 1872.
63,220,417 "	6	"	" March 1, 1873.
38,615,392 "	4	"	" July 1, 1873.
44,034,709 "	2	"	" September 1, 1873.
58,160,138 "	6	"	" March 1, 1874.
70,471,009 "	6	"	" September 1, 1874.
55,298,136 "	4	"	" January 1, 1875.
577,584,843 "	Total.		

B.—*Gross Receipts from West Bound Northern Transportation Co.'s Business.*

Railroads.	6 months to Sept. 1, 1871.	6 months to M'ch 1, 1872.	6 months to Sept. 1, 1872.	6 months to M'ch 1, 1873.	4 months to July 1, 1873.	2 months to Sept. 1, 1873.	6 months to M'ch 1, 1874.	6 months to Sept. 1, 1874.	4 months to Jan'y 1, 1875.	Total.
Ogdensburg & L. C. R. R.	22,903 33	12,619 74	21,484 92	16,547 84	12,794 99	5,537 29	7,729 04	13,913 60	6,693 09	119,323 75
Montreal & Plattsburg R. R	829 61	574 28	995 39	837 18	144 72					3,381 18
Whitehall & Plattsburg R. R.	818 94	564 06	979 88	824 74	144 73					3,332 34
Vt. Central R. R.	19,453 99	9,625 66	17,414 28	13,755 77	12,510 12	5,199 37	7,280 40	12,563 78	7,274 34	105,077 12
Vt. Valley R. R.	94 93	39 24	66 45	93 70	63 63	38 43	55 98	82 86	33 30	559 52
Vt. & Mass. R. R.	19 23	1 82	17 13	41 51	17 95	8 94	13 39	15 33	9 95	145 25
Rutland R. R.	3,856 64	2,264 58	3,356 42	2,247 87	2,174 17	1,071 86	1,575 28	3,214 56	1,898 67	21,660 02
Addison railroad						06	01	02		09
Missisquoi R. R.								3 93		3 93
Sullivan R. R.	254 96	43 70	208 75	222 35	119 16	101 94	76 26	124 63	81 75	1,233 50
New London N. R. R.	25 13	11 66	67 73	195 29	127 89	45 61	37 23	29 39	19 47	559 40
	47,356 67	25,735 74	44,590 95	34,766 24	28,097 27	12,003 50	16,767 59	29,947 57	16,010 57	255,276 10
Northern railroad	2,363 15	1,059 40	2,487 60	2,088 98	1,894 74	436 67	809 21	1,178 29	662 87	12,980 91
Concord railroad	823 42	359 99	942 87	827 61	714 84	168 47	350 85	473 25	270 49	4,902 70
Nashua & Lowell R. R.	1,936 18	569 12	915 34	740 54	739 64	202 00	319 23	563 52	370 42	5,455 99
Boston & Lowell R. R.	2,306 33	1,266 75	2,037 37	1,648 29	1,646 29	449 62	749 54	1,254 32	824 48	12,143 99
	6,529 08	3,226 17	6,383 18	5,305 42	4,995 51	1,256 76	2,189 83	3,469 38	2,128 26	35,483 59
	53,885 75	28,961 91	50,974 13	40,071 66	33,092 78	13,260 26	18,957 42	33,416 95	18,138 83	290,759 69

TONNAGE.

33,181,088 lbs.	6 months to	September 1, 1871.
19,026,539 "	6 "	" March 1, 1872.
27,189,244 "	6 "	" September 1, 1872.
20,941,575 "	6 "	" March 1, 1873.
18,563,805 "	4 "	" July 1, 1873.
7,885,575 "	2 "	" September 1, 1873.
11,482,756 "	6 "	" March 1, 1874.
21,325,518 "	6 "	" September 1, 1874.
11,077,054 "	4 "	" January 1, 1875.
170,740,154 "	Total.	

109 *Report of Horace B. Wilbur. Filed Dec.* 28, 1882.

Mr. C. S. Mellen and myself have acted under the agreement signed by the above parties and filed in the United States circuit court for Massachusetts, May 18, 1882, and I state the following account as the result of my investigation:

I find and report that the total tonnage of freights brought by the steamboats of the Northern Transportation Company to the lines composed of the roads of the parties of the third part to the contract annexed to the plaintiff's bill, or to any roads leased or operated by said parties of the third part, or either of them, from the first day of March, 1871, to the close of business of the Northern Transportation Company, for the year 1874, was 557,584,843 pounds, and that the gross receipts therefrom upon said line and upon any road so leased or operated were $1,146,849.42. That the gross receipts of each of the parties of the third part therefrom during said time were as follows:

Boston & Lowell railroad received	$10,659 66
Nashua & Lowell railroad received	4,789 12
Northern railroad received	53,125 97
Vermont Central railroad (meaning by that term, the trustees and managers Vermont Central and Vermont and Canada railroads)	1,078,274 67
	$1,146,849 42

I also find and report that the amount of freight carried from said roads of the parties of the third part to said contract (*i. e.*, on the Boston and Lowell railroad, the Nashua and Lowell railroad, the Northern railroad, and the Vermont Central railroad), to the steamers of the parties of the first part to said contract at Ogdensburg during the same time were 170,740,154 pounds, and that the gross receipts therefrom upon said line and upon any road so leased or operated, were $284,064.09. That the gross receipts of each of the parties of the third part therefrom during said time were as follows, to wit:

Boston & Lowell railroad received	$12,143 99
Nashua & Lowell railroad received	5,455 99
Northern railroad received	12,980 91
Vermont Central railroad received	253,483 20
	$284,064 09

110 I attach to this report an account showing all business brought by the steamboats of the Northern Transportation Company to the lines composed of the roads of the parties of the third part, and showing also the business carried to the steamboats of the Northern Transportation Company by the line composed of the roads of the parties of the third part.

It being claimed by the Ogdensburg Railroad Company that by

the contract in question not merely freight laden on board and brought by the steamboats of the Northern Transportation Company to the line composed as aforesaid, but freight in barges towed by the boats of said Transportation Company to Ogdensburg, or in schooners chartered by said Transportation Company for that purpose, is embraced in said contract, and also that by agreement between the parties, freight landed by said Transportation Company's steamers at Sarnia, and thence transported to Ogdensburg, was to be deemed embraced by said contract, and these claims being subject of evidence and judicial determination, I have not deemed it my duty to investigate and state the account in the manner which will be requisite if such claims shall by law be sustained.

The receipts of the Concord railroad are correct, as stated by Mr. Mellen in his report. I have not included them in this report, as the contract was not signed by that company.

The receipts of the Sullivan road and of the New London Northern road are correctly stated in Mr. Mellen's report, but I have not included them in this report, as the trustees of the Vermont Central and Vermont and Canada Railroad Companies deny that said roads or either of them were leased to or operated by said companies, or either of them, and I assume that it is not in the power of Mr. Mellen and myself to take evidence, hear the parties, and determine the question.

In making up the sums received by each of the parties of the third part to the contract annexed to the bill, I have done as Mr. Mellen has done in his account, assumed that the gross amount of receipts attributable to each of the parties is to be reduced or added to by certain charges of car service, terminal charges, elevating charges, bridge charges, and a ten per cent. commission, and that such is the construction of the words gross receipts in the con-
111 tract. This principle is denied by the plaintiff, and I do not feel myself competent to decide as to the law in the question. If the court shall determine that the principle thus assumed by me is incorrect, the amount stated by me to have been received by each of the parties will be very considerably changed.

The above statement of gross receipts and the account annexed hereto are based upon the assumption that the road of the plaintiff was one of the roads leased or operated by the trustees of the Vermont Central and Vermont and Canada railroads under the contract. This fact, however, is denied by the plaintiff, and I do not consider myself competent to try and settle the question. The account annexed furnishes the means of correction, if the assumption shall be decided in law to be wrong.

Boston, Dec. 27, 1882. HORACE B. WILBUR.

Gross Receipts from Freight carried in the steamers of the Northern Transportation Company.

Railroads	East.	West.	Total.
	March 1, 1871, to Jan'y 1, 1875.	March 1, 1871, to Jan'y 1, 1875.	March 1, 1871, to Jan'y 1, 1875.
Ogdensburg and Lake Champlain	$557,734 27	$119,323 75	$677,058 02
Montreal & Plattsburg	3,698 24	3,381 18	7,079 42
Whitehall & Plattsburg	394 45	3,332 34	3,726 79
Vermont Central	454,878 44	105,077 12	559,955 56
Vermont Valley	4,144 64	559 52	4,704 16
Vermont & Massachusetts	1,656 82	145 25	1,802 07
Rutland	55,248 20	21,660 02	76,908 22
Steamer Oakes Ames	97 50	-------	97 50
Montreal & Vt. Junction	170 90	-------	170 90
Addison	20 13	09	20 22
Stanstead, Shefford & Chambly	7 57	-------	7 57
Missisquoi	223 51	3 93	227 44
	$1,078,274 67	$253,483 20	$1,331,757 87
Northern	$53,125 97	$12,980 91	$66,106 88
Nashua & Lowell	4,789 12	5,455 99	10,245 11
Boston & Lowell	10,659 66	12,143 99	22,803 65
	$68,574 75	$30,580 89	$99,155 64
	$1,146,849 42	$284,064 69	$1,430,913 51
	Tonnage. East.	Tonnage. West.	Tonnage. Total.
	577,584,843 lbs.	170,740,154 lbs.	748,324,997 lbs.

112 *Stipulation. Filed April 8, 1884.*

In the above-entitled cause it is agreed that the sum of $30,690.64, which was received by Smith and Stark, parties of the second part to the contract, a copy of which is annexed to the plaintiff's bill, from money of the Boston and Lowell railroad, was received and properly applied by them under the provisions of said contract.

S. BARTLETT,
For Plaintiff.
J. H. BENTON, Jr.,
For Defendant.

Stipulation. Filed April 8, 1884.

It is agreed by the parties as follows:

First. To save encumbering the record, formal replications to the answers of the defendants shall be deemed to have been filed in all cases where they have not already been filed.

Second. The papers hereto annexed, marked respectively "A," "B," and "C," shall be taken to have been executed between the parties to them, and may be printed as evidence in the cause.

Third. The printed statutes, public or private, of the States of New Hampshire, Massachusetts, and New York, may be referred to by either party.

Fourth. The following papers and depositions may be printed as evidence in the case, to wit:

(*a.*) The stipulation filed on the eighteenth day of May, 1882, as to passenger receipts.

(*b.*) The stipulation appointing Messrs. Wilbur and Mellen, filed May 18, 1882.

(*c.*) The stipulation filed herewith as to the application by Smith and Stark, parties of the second part to the contract, annexed to the plaintiff's bill, of the money received by them from the defendant.

(*d.*) The following depositions, to wit, the first and second depositions of Henry A. Church, deposition of Josiah G. Abbott,
113 deposition of George Stark, deposition of Charles E. A. Bartlett, deposition of Charles S. Mellen, deposition of John C. Pratt.

The depositions of H. B. Wilbur, R. F. Church, William O'Shrier, and William H. Craig, being considered by counsel not to be material to the questions arising at this stage of the case, are not to be printed now, but may be printed at any time hereafter upon notice to the defendant, and the defendant shall have opportunity to take such testimony in reply to said depositions as it may desire.

Fifth. The cause may be now set down for hearing.

April 4, 1884.

S. BARTLETT,
For Plaintiff.
J. H. BENTON, JR.,
For Defendant.

A.

It is hereby agreed by and between the Vermont and Canada Railroad Company, the trustees and managers of the Vermont Central Railroad Company, the Northern Railroad of New Hampshire, the Nashua and Lowell Railroad Corporation, and Boston and Lowell Railroad Corporation, as follows:

Whereas a contract of this date has been drawn to be executed by the parties hereto in conjunction with the Concord Railroad Corporation, and to be assigned to the Ogdensburgh and Lake Champlain Railroad Company as collateral security for the performance of a contract of this date between the Vermont and Canada Railroad Company and the trustees and managers of the

Vermont Central Railroad Company and the Ogdensburgh and Lake Champlain Railroad Company;

And whereas the Concord Railroad Corporation is not now ready to execute said contract, and the parties hereto believe it for their interest that the same should immediately go into effect, whether executed by said Concord Railroad Corporation or not:

Therefore, we covenant and agree with each other and all of the others, that said contract may be delivered without being executed by said Concord Railroad Corporation, and that when so delivered it shall be of full force and effect and obligatory upon each and all of us from this date, but this shall not prevent the execution
114 of said contract by said Concord Railroad Corporation at any time hereafter.

In witness whereof, the said corporations have caused their corporate seals to be hereto affixed and these presents to be signed, and the trustees and managers of the Vermont Central Railroad Company have hereto set their hands and seals, this twenty-fourth day of February, A. D. eighteen hundred and seventy.

(Signed) VERMONT & CANADA
RAILROAD COMPANY, [SEAL.]
By JOHN PORTER, *Vice-President.*

TRUSTEES & MAN.
V. CEN. & V. & CAN. R. R.,
By I. GREGORY SMITH, [SEAL.]
B. P. CHENEY, [SEAL.]
L. BRAINERD, [SEAL.]
JOSEPH CLARK. [SEAL.]

[SEAL.] THE BOSTON & LOWELL
RAILROAD CORPORATION,
By its Committee,
F. B. CROWINSHIELD,
J. G. ABBOTT,
GEO. STARK, *Manager,*
Committee.

[SEAL.] THE NASHUA & LOWELL
RAILROAD CORPORATION,
By its Committee,
F. B. CROWINSHIELD,
GEO. STARK, *Manager,*
J. G. ABBOTT,
Committee.

[SEAL.] THE NORTHERN RAILROAD
CORPORATION,
By its Committee,
ONSLOW STEARNS,
URIEL CROCKER.

115 B.

At a meeting of the directors of the Ogdensburg and Lake Champlain railroad, held September 27, 1876, the trustees and managers of the Vermont Central and Vermont and Canada railroads having failed to pay the monthly payments of rental due from them to the Ogdensburg on the first day of August and on the first day of September, 1876, upon proper demand therefor, the following preamble and vote were adopted:

Whereas the monthly payment due on the first day of September instant, under a contract with the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Railroad Company, has been refused by said party, and by the manager of the Boston and Lowell Railroad Company, and by the Central Vermont Railroad Company:

Therefore voted, that the president, under the advice of Messrs. Evarts, Southmayd, and Choate, of New York, be, and hereby is instructed to adopt such measures and institute such legal proceedings as they may recommend to obtain possession of our road and property, and to enforce any and all claims we may have under said contract.

C.

Memorandum of settlement between the Ogdensburg & Lake Champlain Railroad Company and the Central Vermont Railroad Company, receiver and manager of the Vermont Central and the Vermont & Canada railroads.

First. The contract for the use of the Ogdensburg & Lake Champlain railroad, dated Feb. 24, 1870, between the Ogdensburg & Lake Champlain Railroad Company and the Vermont & Canada Railroad Company, and the trustees and managers of the Vermont Central and the Vermont & Canada railroads, is to be treated as, and is hereby terminated as, of the day the receiver of the Ogdensburgh and Lake Champlain railroad took possession of the same in October last.

Second. The rents and all other monies due the Ogdensburg & Lake Champlain railroad Company under this contract aforesaid up to the time said railroad was taken possession of by said
116 receiver as aforesaid, and all liabilities under said contract are hereby fully discharged and released by the Ogdensburgh & Lake Champlain Railroad Company in favor of the Central Vermont Railroad Company, receiver as aforesaid, and all the other parties to said contract, and the Ogdensburg & Lake Champlain Railroad Company are to pay the Central Vermont Railroad Company fifty thousand dollars, in three equal installments on six, eight, and ten months from date, in notes without interest, which is to be in full for all claims for improvements made to the road & property of said Ogdensburg & Lake Champlain Railroad Company while in the possession of said receivers & managers under said contract.

Third. The supplies & materials purchased by W. J. Averill, as

receiver of said Ogdensburg & Lake Champlain railroad, as inventoried by Mr. Andrus and Mr. Hobart, are agreed upon at eighty-four thousand dollars.

The payments made by said receiver on the same, including car service of all Ogdensburg & Lake Champlain R. R. Company's cars in the hands of the Central Vermont Railroad Company, as receiver, since said Averill took possession, including those not delivered as well those delivered to the said Averill, receiver, are to be applied toward said supplies. The balance due for supplies & materials as aforesaid is to be assumed and paid on demand by the Ogdensburg & Lake Champlain Railroad Company.

Fourth. The rolling-stock of the Ogdensburg & Lake Champlain Railroad Company now in possession of the Central Vermont Railroad Company, receivers, etc., is to be so rendered without delay, and the Ogdensburg and Lake Champlain Railroad Company release all claims of their own, and agree to indemnify the Central Vermont Railroad Company, receivers, against all claims of the said Averill, receiver, for the detention of the same, except the car service aforesaid.

Fifth. The Ogdensburg & Lake Champlain Railroad Company hereby release and discharge the Vermont Central and the Vermont & Canada railroads & the managers thereof, past and present, and J. G. Smith and George Stark, named as trustees therein, from all claims under the boat contract, so called, and from all liability to contribute to the sinking fund provided for in said contract,
117 and agree to indemnify said road and managers against all claims that can or may be made against them by the Northern, Lowell & Nashua & Boston railroads in respect thereto growing out of any recovery against or payment by said last-named parties by or to said Ogdensburg & Lake Champlain Railroad Company, or to any other party in privity with said last-named company.

Sixth. Business contracts made prior to this date by the Central Vermont Railroad Company for the transportation of freight and passengers over the Ogdensburg and Lake Champlain railroad are to be carried out by the Ogdensburg and Lake Champlain Railroad Company, so far as their road is concerned, at such rates as may be agreed upon, or in the absence of such agreement not to exceed local rates as established by their tariff of March 3, 1877. The contract heretofore made by the Central Vermont Railroad Company with the Northern Transit Company for the traffic over the Ogdensburg & Lake Champlain railroad is to be carried out, and the rates of division of freights earned under said contract east of Ogdensburg shall be *pro rata*, and the terminal charges to be as now in force.

Seventh. The first action brought in the supreme court of the State of New York by the Ogdensburg & Lake Champlain Railroad Company against the Vermont & Canada Railroad Company, John G. Smith & others, managers, etc., The Central Vermont Railroad Company and John Schrier for the recovery of the possession of the Ogdensburg & Lake Champlain railroad, on the ground of the invalidity of the agreement of February 24, 1870, is hereby discontinued without cost to either party, all appeals therein withdrawn,

and satisfaction of the judgments for costs therein in favor of the defendants, or any of them, to be entered of record. The demurrers and appeals on the part of the defendants in the second action brought by said Ogdensburg & Lake Champlain Railroad Company against said Vermont & Canada Railroad Company, John G. Smith, Clark & Cheney, and the Central Vermont Railroad Company, in which the receiver was appointed, are hereby withdrawn, and the plaintiff may forthwith take judgment therein for the recovery of the possession of said railroad and property without costs & without damages of any kind whatsoever against any of the defendants, the defendants therein to waive all rights to notice of settlement
118 of the accounts of the receiver in said action. Such stipulations as may be necessary to carry out this provision shall be executed by the attorneys of the respective parties in said actions. The suit in the State of Massachusetts in favor of said Ogdensburg & Lake Champlain Railroad Company against Benjamin P. Cheney and others, for the cars and other property of said Ogdensburg and Lake Champlain Railroad Company, shall be discontinued without costs or damages to either party. Such further instruments or writings as may be necessary to carry out this agreement shall be executed when required.

In witness whereof, the said Central Vermont Railroad Company, as receivers and managers, acting herein by James R. Langdon, its committeeman for that purpose, duly authorized by vote of the directors of the said company, and the Ogdensburg & Lake Champlain Railroad Company, acting herein by Samuel M. Felton, its committeeman for that purpose, duly authorized by vote of the directors of said company, have, this seventeenth day of March, A. D. 1877, respectively set the names of said companies.

CENTRAL VERMONT RAILROAD COMPANY,
Receivers and Managers.
By JAMES R. LANGDON.
OGDENSBURG AND LAKE CHAMPLAIN
RAILROAD COMPANY,
By S. M. FELTON.

119 *Evidence for Complainant.*

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States in equity, as amended, before me—

WINSLOW WARREN,
U. S. Commissioner.

Present: Sidney Bartlett, Esq., of counsel for complainants; J. H. Benton, Jr., Esq., of counsel for defendants.

Deposition of Henry A. Church.

APRIL 29, 1882.

Direct examination by SIDNEY BARTLETT, Esq., of counsel for complainant:

Ans. My name is Henry A. Church; Boston, Mass.; have been

treasurer of the Ogdensburg and Lake Champlain railroad from the fall of 1866 to the present time. I have in my possession a copy of the contract of Feb. 24, 1871, and have compared it with the copy in the bill.

(Parties here agree that it is a true copy and in the possession of Mr. Church.)

After the execution of the contract the sums requisite for the sinking fund fixed by the parties named in the article, namely, John C. Pratt, president of Ogdensburg, myself as treasurer; Francis B. Crowninshield, president of the Boston and Lowell railroad, and C. E. A. Bartlett, treasurer of the Boston and Lowell, were fixed. The paper of Oct. 5, 1871, a copy of which I hereto annex, marked "Exhibit A[1], W. W.," was submitted to me by George Stark, general manager of the Boston and Lowell railroad. Mr. Pratt and myself acceded to the terms of this statement. I don't know anything about Mr. Crowninshield, — what was done there. I acted as treasurer of the trustees of the sinking fund, and the fund set forth
120 in the paper hereto annexed, marked "B, W. W.," was paid to me by the managers of the Boston and Lowell railroad. I hereto produce and annex a copy of my account as said treasurer of all sums received and paid as said treasurer of the sinking fund, the same being marked "Exhibit C, W. W." Among the items in the debit account is one of loan to Elijah Smith, $8,800. The money was loaned to Elijah Smith until such time as we could secure either class of bonds under the contract. We have given up the note and taken the collateral as a substitute—fifteen thousand Burlington and Southwestern first mortgage bonds, which I have exchanged now for four per cent. Chicago, Burlington and Quincy railroad bonds—at eighty, as near as I can recollect.

Int. What advance, if any, did the Ogdensburg Company make under the contract, and will you produce the voucher received and annex a copy of it?

(Paper objected to as evidence.)

Ans. Six hundred one thousand dollars eight per cent. sinking fund bonds. I produce the voucher and will annex copy.

(Same marked "Exhibit E, W. W.")

Cross-examination by J. H. Benton, Jr., Esq., of counsel for defendants:

Cross-int. 1. You have annexed a copy of an original letter from George Stark to you, which is Exhibit A; did you make any reply to that letter?

Ans. Verbal one. After submitting it to Mr. Pratt we assented. No written one that I recall.

Cross-int. 2. Did you submit it to Mr. Bartlett, or did the four gentlemen you have named—Messrs. Pratt, Crowninshield, Bartlett, and yourself—have a conference together at any time to fix definitely at such conference the sums to be paid by the parties of the third

part to said contract to you semi-annually as trustees under the provisions of article 5 of the contract?

Ans. I don't recall any such meeting, any meeting. I did not submit it to Mr. Bartlett.

Cross-int. 3. As I understand it from your account annexed, Exhibit C, you are now acting as treasurer of the trustees of the
121 sinking fund provided for by the contract, the present trustees, according to the wording of the contract, being the president and treasurer of the Lowell and president and treasurer of the Ogdensburg roads, or the persons who held those offices when the trust terminated, and you have as such treasurer in your hands about five hundred dollars in cash and the collateral, the right to the bonds of the C., B. and Q. R. R., which you have mentioned as collateral to the Smith loan.

Ans. Yes, sir.

Cross-int. 4. Will you explain how and how much money was realized by the parties of the second part of the contract?

Ans. We turned the six hundred bonds over to the treasurer of the Boston and Lowell railroad corporation. We received four per cent. in bonds back, twenty-four thousand dollars face value. These bonds were not all delivered in one day; can't tell here how they were delivered.

Cross-int. 5. Is it not a fact that you actually delivered into the hands of Mr. Bartlett, treasurer of the Lowell road, only five hundred and seventy-six bonds, and retained the twenty-four as treasurer of the Ogdensburg road?

Ans. I do not recollect.

Cross-int. 6. Do you know how much money was realized by parties of the second part from the five hundred and seventy-six bonds?

Ans. I never knew.

Direct examination resumed:

Ans. The bonds I delivered were eight per cent. sinking fund bonds.

Int. 7. Whether or not was there any agreement by which you were to receive or not any premium upon the bonds for delivery of the bonds instead of cash; and, if so, what was that premium; was it equal or larger or less than the twenty-four bonds which you retained or were delivered back to you?

(Objected to.)

Ans. That was the exact amount which we were to receive for the bonds on delivering them. Bonds ran to 1890.

Cross-examination resumed:

Cross-int. 8. Who made any such agreement; was it in writ-
122 ing? State fully and definitely when, where, and by whom it was made, and all you now know or remember about it.

Ans. It was made by Gen. Stark, March 4, 1871. I annex a letter

to John C. Pratt, president, showing the proposition made, which was ultimately acceded to and carried into effect.

(Same is marked "Exhibit D, W. W.")

Cross-int. 9. Do you personally know anything about such an agreement except what is shown by this letter from Stark to Pratt; if so, what is it?

Ans. [I carried out this agreement as treasurer.] I didn't know anything more than the paper signifies.

(Part in brackets objected to by counsel for defendants as not responsive.)

HENRY A. CHURCH.

Attest: WINSLOW WARREN,
U. S. Comm'r.

EXHIBIT A[1], W. W.

L. MILLS, *General Agency*,

Vermont Central Line, Boston, Lowell, & Nashua, Concord, Northern Vermont Central, Vermont & Canada, and Ogdensburgh, & Lake Champlain Railroads.

BOSTON, *Oct. 5th*, 1871.

SIR: Enclosed herewith please find a printed copy of contract between the Northern Transportation Company, the Vermont Central Line, and the Ogdensburgh railroad, by which you are appointed one of the trustees of the sinking fund to be accumulated under provisions of article 5th for the payment of certain bonds.

I submit for your consideration the following estimate of sums to be paid semi-annually into your hands for the purposes named, viz:

To pay $100,000 O. & L. C. R. R. bonds March 1, 1873	24,000
To pay $400,000 N. T. Co. bonds in 1881	15,000
To pay $500,000 O. & L. C. R. R. bonds in 1890	7,500
Total	$46,500

Respectfully,

GEO. STARK,
Gen. Manager.

HENRY A. CHURCH, Esq.,
Treas. O. & L. C. R. R.

123 EXHIBIT B, W. W.

Payments to H. A. Church, Treas., Trustees of Sinking Fund Northern Transportation Co. and Ogd. & Lake Champlain R. R. Co. Bonds.

1871.					
Oct. 27.	From	Geo. Stark,	manager	Boston & Lowell R. R.	46,500
1872.					
M'ch 1.	"	"	"	"	46,500
Sep'r 9.	"	"	"	"	46,500
1873.					
Ap'l 14.	"	"	"	"	46,500
Sep'r 10.	"	"	"	"	22,500
1874.					
M'ch 3.	"	"	"	"	22,500
Sep'r 14.	"	"	"	"	22,500

1873, July.	Amount paid for $132,000 Ogd. & Lake Champlain sinking fund 8 per cent. bonds as principal	$132,000		
	For premium & accrued interest	3,935 33		
			$135,935 33	
1877, July.	Am't p'd for $74,000 Ogd. & Lake Champlain sinking fund 8 per cent. bonds & accrued interest		72,953 64	
1878, Ap'l.	Am't p'd for $2,000 Ogd. & Lake Champlain sinking fund 8 per cent. bonds & accrued interest		2,065 12	
1874, M'ch.	Am't p'd for $73,500 Northern Transportation Co. mort. bonds & interest		72,403 65	
1878.	Am't of sundry expenses pr. expense ac.		54 14	
	Am't of loan to Elijah Smith, represented now by collateral		8,800	
1878, Ap'l 5.	Am't on deposit in New England Trust Co. on interest @ 2½ per cent. pr. annum		474 88	
				292,686 76

1873, Ap'l 14.	By 4 instalments of $46,500 each received to date from manager Boston & Lowell Railroad Co.		186,000	
1874, Sept. 14.	By 3 instalments of $22,500 each received to date from manager Boston & Lowell Railroad Co.		67,509	
" "	By am't rec'd, manager Boston & Lowell R. R. Co. Interest to date @ 6 per cent. on $132,000 Ogd. & Lake Champlain sinking fund bonds purchased & cancelled		16,380	
	Interest collected as follows to Dec. 27, 1877:			
	From loans	727 81		
	Coupons Northern Transportation Co	14,943 00		
	Do. Ogd. & Lake Champlain R.R. Co. sinking fund bonds	7,120 00		
			22,790 81	
1877, Dec. 27.	Interest received on deposit to date from New England Trust Co.		15 95	
				292,686 76

NOTE.—$208,000 Ogd. & Lake Champlain R. R. sinking fund bonds bought and cancelled.

73,500 Northern Transportation Co. mortgage bonds on hand which were purchased by trustees.

E. E.

H. A. CHURCH,
Treas'r, Trustees.

Boston, March 12, 1880.

125 EXHIBIT D, W. W.

BOSTON, *March* 4, 1871.

JOHN C. PRATT, *Pres.*

DEAR SIR: If, in place of the money which the Ogdensburgh & Lake Champlain R. R. is to advance to us under the agreement to secure steamboat connections west of Ogdensburgh, your company will deliver us its eight per cent. bonds, for an equal amount we will allow a premium of 4 per cent. on the same, and we will also pay your company $20 a share for the N. T. Co. stock which they own; it being understood that 470 shares of said stock is owned by said company and is to be transferred to us as above at $20 a share.

GEO. STARK,
For self and for J. G. Smith, Exc. Com., &c., Vermont Central Line.

EXHIBIT E, W. W.

BOSTON, *Oct.* 7, 1871.

Received of Henry A. Church, treasurer of the Ogdensburgh & Lake Champlain railroad, six hundred bonds of the value of one thousand dollars each, issued by the Ogdensburgh & Lake Champlain Railroad Co., and dated March 1, 1871, with coupons of forty dollars each attached thereto, numbered from 2 to 38 (both numbers inclusive).

C. E. A. BARTLETT,
Trustee, Bos. & Lowell R. R. Corp.

126 *Evidence for Complainant.*

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended.

Before me— FISHER AMES,
U. S. Commissioner.

Present: Sidney Bartlett, Esq., of counsel for complainant; J. H. Benton, Jr., Esq., of counsel for defendants.

Second Deposition of Henry A. Church.

BOSTON, *March* 24, 1883.

Direct examination by SIDNEY BARTLETT, Esq., of counsel for complainant.

Int. 1. What is your name, and have you formerly given your deposition in this case?

Ans. Henry A. Church: I have already testified in this case.

Int. 2. In your former deposition you produced and annexed to your answers a statement of your account as treasurer of the trustees of the sinking fund provided for in the contract, a copy of which is annexed to plaintiff's bill. Will you now state if that account has been closed, and how; and produce a copy of the account by which the same is closed and annex it to your answer?

Ans. The account has been closed; in April, 1873, we received a

payment from the manager of the Boston and Lowell Railroad Corporation, and not being able at once to invest in the bonds of the Ogdensburg and Lake Champlain Railroad Company and the Northern Transportation Company, the president of the Ogdensburg and Lake Champlain Railroad Company and myself, both of us being trustees of the sinking fund, made a loan in behalf of the trustees to Elijah Smith. In the May following, we demanded the amount of the loan, or the balance of the loan, and he could not respond.

127 We held from him as collateral $15,000 of Burlington and Southwestern railroad eight per cent. first mortgage bonds. The account submitted, showing the balance of $8,800, remained in that form when the first account was presented. The collateral remained in this form until foreclosure proceedings were had, when we, the trustees, surrendered the Burlington and Southwestern bonds for a receipt, I think it was from a committee; subsequently the trustees received for that receipt $15,000 of Chicago, Burlington, and Quincy railroad four per cent. bonds, denominated Southwest Division. After collecting $300, the first coupon, these bonds were sold and sinking fund bonds of the Ogdensburg and Lake Champlain Railroad Company were purchased with the proceeds thereof. I produce, to be annexed, a copy of the account by which the same was closed.

(Paper produced marked "Complainant's Exhibit 1, F. Ames, U. S. Commissioner, March 24, 1883," and annexed.)

Int. 3. Have or not the trustees of the sinking fund now in their hands any sum of money, or other thing of any kind or of any value, belonging thereto; and, if so, what?

(Objected to, as leading.)

Ans. The trustees did hold $73,500 of Northern Transportation Company bonds. A proposition was made by parties to purchase said bonds, and the directors of the Ogdensburg and Lake Champlain Railroad Company requested the trustees to assign said bonds, which they all assented to. No money has been received on account said bonds, and it is very doubtful whether anything will be realized therefrom. As treasurer of the trustees, I know that there is no money in the sinking fund, and there is no other property in it than what I have stated.

Cross-examination by J. H. BENTON, Jr., Esq., of counsel for defendants:

Cross-int. 4. What persons were, respectively, president and treasurer of the Ogdensburg road, and president and treasurer of the Boston and Lowell road at the time this sinking fund was established?

128 Ans. J. C. Pratt was president of the Ogdensburg road, and I was treasurer. T. B. Crowninshield and C. E. A. Bartlett were president and treasurer, respectively, of the Boston and Lowell road.

Cross-int. 5. Did these persons, upon the execution of the contract

annexed to the plaintiff's bill, or soon after, meet together and act with reference to the sinking fund?

(Objected to, as inquiring into matters not the subject of the direct examination.)

Ans. They held their first meeting soon after the first payment was made to the sinking fund.

Cross-int. 6. Was any record made by anybody of their doings at that meeting; if so, who made it, and where is it?

(Same objection.)

Ans. There was; a record was made by myself as clerk of the trustees, and the record is here, and it is submitted.

Cross-int. 7. At this meeting the board was organized by the choice of Mr. Crowninshield as chairman, and yourself as clerk and treasurer, was it not?

(Same objection.)

Ans. Yes, sir.

Cross-int. 8. And from that time you made a correct record of the action of the trustees at their various meetings, so long as they acted, did you not?

(Same objection.)

Ans. I did.

Cross-int. 9. Will you annex a copy of such record to your answer to this interrogatory?

(Same objection.)

I will.

MONDAY, *March* 26, 1883.

(Paper produced as copy of record and marked "Complainant's Exhibit 2, F. Ames, U. S. Commissioner, March 26, 1883," the same being on three sheets of paper, and annexed.)

Cross-int. 10. By your account annexed to your deposition taken in this cause April 29, 1882, there appears to have been then in the hands of the trustees $9,274.88, consisting of $8,800 due from Elijah Smith and represented by collateral, and 474.88 cash; and
129 also $73,500 of Northern Transportation Company mortgage bonds on hand, which were purchased by trustees. At that time, in April, 1882, who were, respectively, president and treasurer of the Ogdensburg road and of the Boston and Lowell road?

(Same objection.)

Ans. W. K. Blodgett president, and myself treasurer of the Ogdensburg, and J. G. Abbott president, and C. E. A. Bartlett treasurer of the Lowell road.

Cross-int. 11. How long prior to that time had the trustees of the sinking fund had any meeting?

Ans. The last meeting of the trustees was in February, 1878, as appears by the record.

Cross-int. 12. What, if anything, did Messrs. Bartlett and Abbott have to do with the disposition of the property which you testified was in the hands of the trustees of the sinking fund on April 29, 1882?

Ans. Nothing whatever as to the loan reported to Elijah Smith or the balance of cash represented on hand. They both signed a paper assigning these Northern Transportation Company bonds to a party in the State of New York.

Cross-int. 13. When?

Ans. I can't here state. I think the copy of the assignment is at my office, I should say it was before April 29, 1882; I should say from memory that it was more than a year ago; I am quite sure it was.

Cross.int. 14. Were either Mr. Abbott or Mr. Bartlett consulted about the disposition of the property which was in the hands of the trustees, April 29, 1882?

Ans. Not as to the amount loaned to E. Smith, or the cash balance represented on hand, but they were as to the disposition of the Northern Transportation Company bonds.

Cross-int. 15. You assume, then, to dispose of the property in the hands of the trustees, April 29, 1882, without any action on their part, did you not?

Ans In consultation with Mr. Blodgett, he and I acted in respect, to the proceeds of the loan to E. Smith, and any cash balance on hand.

130 Cross-int. 16. And you and Mr. Blodgett disposed of the property without consultation with, or knowledge by, your co-trustees?

Ans. We did.

Cross-examination by A. S. HALL, Esq., of counsel for the Nashua and Lowell Railroad Company:

Cross-int. 17. Did not the Ogdensburg and Lake Champlain Railroad Company at some time execute to Messrs. Smith and Stark, trustees of the sinking fund, a release of any claim it had or might have to funds held by them as such trustees?

(Objected to, as not being upon any subject-matter contained in the direct interrogatories.)

Ans. Not to my knowledge.

Cross-int. 18. Did that company execute any release to any trustees of the sinking fund, that you know of?

(Same objection.)

Ans. Not to my knowledge.

Cross-int. 19. Have you ever heard of such a release from the Ogdensburg company?

(Same objection, and in addition, that it seeks for hearsay.)

Ans. I have heard of a release, but not to trustees—the way the question was put before.

Cross-int. 20. Have you known of a release, from said company to Messrs. Smith and Stark?

(Same objection.)

Ans. Not of my own knowledge.

Cross-int. 21. Have you never seen such release, or in your official capicity known of its existence?

(Same objection.)

Ans. I have never seen such a release. I have heard of such a one; but I have not known it in my official capacity.

Cross-int. 22. In whose custody is it now?

(Same objection.)

Ans. I do not know positively.

HENRY A. CHURCH.

Attest: FISHER AMES,
U. S. Commissioner.

COMPLAINANT'S EXHIBIT 1.—F. AMES, *U. S. Commissioner, March* 24, 1883.

Trial Balance Trustees Northern Transportation Company and Ogdensburgh and Lake Champlain Railroad Co. Bonds to Dec. 9th, 1882.

1873, July.	Am't p'd for $132,000 Ogd. & Lake Champlain sinking fund bonds, as principal	132,000 00	
	Prem. & int'st	3,935 33	
			135,935 33
1877, July.	P'd for $74,000 Og. & Lake Champlain sinking fund bonds, and interest		72,953 64
1878, Ap'l.	P'd for $2,000 Ogd. & Lake Champlain sinking fund bonds, and int'st		2,065 12
1882, Nov.	P'd for $1,000 Ogd. & Lake Champlain sinking fund bonds, prem. & int'st		1,047 89
Dec. 9.	P'd for $11,000 Ogd. & Lake Champlain sinking fund bonds, prem. & int'st		11,711 45
1874, Mch.	P'd to date for $73,500 Northern Transportation Company bonds, & int'st		72,403 65
1878.	P'd sundry expenses buying N. T. Co's. bonds, expressage, etc.		54 14
			296,171 22

NOTE.—$220,000 Ogd. & Lake Champlain R. R. sinking fund bonds bought and cancelled, leaving $380,000 still outstanding.

$73,500 Northern Transportation Co. bonds on hand, bought by trustees.

1873, Ap'l 14.	By 4 installments of $46,500 each, rec'd to date from manager Boston & Lowell railroad		186,000 00
1884, Sept. 14.	3 installments of $22,500 each, rec'd to date from manager Boston & Lowell railroad		67,500
	Rec'd from manager Boston & Lowell railroad, interest to date on $132,000 Ogd. & Lake Champlain sinking fund bonds, @ 6 per cent., bought & cancelled		16,380
	Interest collected as follows to Dec. 27, 1877:		
	From loans	727 81	
	Coupons Northern Transportation bonds	14,943 00	
	Coupons Ogd. & Lake Champlain bonds	7,120 00	
			22,790 81
1882, Dec. 9.	Interest rec'd on loan to E. Smith, being gain on securities rec'd from him and now sold		3,412 26
	Interest rec'd from New England Trust Co. at sundry times		88 15
			$296,171 22

E. E.

H. A. CHURCH, *Treas'r.*
——— ———, *Trustees.*

Boston, Dec. 9, 1882.

132 COMPLAINANT'S EXHIBIT 2.—F. AMES, *U. S. Commissioner*, *March* 26, 1883.

BOSTON, *Oct* 21, 1871.

The first meeting of the trustees of the sinking fund bonds "Ogdensburgh and Lake Champlain Railroad Company," also trustees of bonds "Northern Transportation Company," consisting of the persons following, viz:

Francis B. Crowninshield, John C. Pratt, C. E. A. Bartlett, and Henry A. Church, appointed trustees under contract dated Feb. 24, 1871, was held at the office of the Ogdensburgh & Lake Champlain Railroad Co., No. 13½ Sears' Building, at one o'clock p. m.

Chose—F. B. Crowninshield, chairman of the board of trustees.

Chose—Henry A. Church, clerk and treasurer of the board.

Voted—That the treasurer be, and is hereby, authorized to receive from the manager of the Boston & Lowell railroad forty-six thousand five hundred dollars, with the interest due thereon from July 1st, 1871, being the first payment due to the sinking fund.

Voted—That the treasurer is hereby authorized to make a loan on call to Elijah Smith at the rate of 7 per cent. pr. ann., he giving bonds as collateral security.

Voted—To open the bank account at the Second National Bank.

Voted—That the account be opened in the names of F. B. Crowninshield, J. C. Pratt, C. E. A. Bartlett, and H. A. Church, trustees of sinking fund, and to be drawn out by checks signed by the treasurer and countersigned by one of the trustees.

Voted—That the treasurer is hereby authorized to buy the sinking fund bonds of the Ogd. & Lake Champlain Railroad Co. to the amount of $31,000, at not above 102½ and accrued interest.

Meeting dissolved.

HENRY A. CHURCH, *Clerk.*

BOSTON, *March* 2, 1872.

A meeting of the trustees was held at Mr. Crowninshield's office at 12 o'clock m., at which all the trustees were present.

133 Voted—To buy of the manager of the Boston & Lowell railroad $36,000 Northern Transportation Co. 8 per cent. bonds at par and accrued interest.

Voted—To loan balance of funds on hand, on call, with good collateral security,

Meeting dissolved.

HENRY A. CHURCH, *Clerk.*

BOSTON, *August* 19, 1872.

A meeting of the trustees was held at the office of the Ogd. & Lake Champlain Railroad Co. at 12 o'clock, noon.

Present: Messrs. Crowninshield, Pratt, Bartlett, and Church.

Voted—That the treasurer be, and is hereby, authorized to buy for the fund forty thousand dollars of the Ogdensburgh & Lake Champlain Railroad Company Sinking Fund Bonds at a premium of not exceeding three and a half pr. ct.

Meeting dissolved. HENRY A. CHURCH, *Clerk.*

BOSTON, *March* 7, 1873.

A meeting of the trustees was held at 11 o'clock a. m., all of them being present.

The following demand was made by the treasurer of the trustees:

BOSTON, *March* 1, 1873.

To the Manager of the Boston & Lowell Railroad Company, Boston:

Please pay to the order of Henry A. Church, treasurer, the amount due December 31st, 1872, to the trustees of the sinking fund under the contract of February 24, 1871, between the Northern Transportation Company, the Ogdensburgh & Lake Champlain Railroad Company, the Nashua & Lowell Railroad Company, the Boston & Lowell Railroad Company, the trustees and managers Vt. Central & Vt. & Canada railroads, the Northern railroad.

J. GREGORY SMITH.
GEORGE STARK.

(Signed) HENRY A. CHURCH,
Treasurer Trustees of Sinking Fund Ogdensburgh & Lake Champlain R. R. Company & Northern Transportation Company Bonds.

134 Voted—To buy $2,000 Ogdensburgh & Lake Champlain Railroad Company Sinking Fund Bonds at par and accrued interest.

The following is the answer made by the manager of the Boston & Lowell R. R. to the treasurer's demand:

Payment is deferred to enable the Vermont Central Line to make such audit of account as will determine whether or not the gross earnings from the boats have been sufficient to meet expenses and other necessary payments and this draft.

Dissolved.

HENRY A. CHURCH, *Clerk.*

BOSTON, *March* 10, 1874.

At a meeting of the trustees held at F. B. Crowninshield's office at one o'clock p. m., all the trustees being present, the clerk offered statements of condition of the sinking fund, which are on file. Mr. Crowninshield proposed that we should try to purchase $5,000 Northern Transportation Co. bonds and $24,000 Ogd. & Lake Champlain R. R. Sinking Fund Bonds, to which the other trustees assented. The purchase of said bonds was left to Messrs. Bartlett and Church to make the best bargain possible.

The loan to Elijah Smith of April 15, 1873, was considered, and Mr. Crowninshield asked what the bonds of the Burlington and Southwestern railroad pledged as collateral could be sold for. The treasurer replied he didn't think they could be sold at present, that when taken they were bringing eighty-five per cent., and at sixty per cent. they would cover the amount for which they were pledged; that in October last, during the panic, a syndicate composed of J. W. Brooks and other capitalists, took $600,000 of these

bonds at eighty per cent. Mr. Crowninshield expressed the opinion that it would be advisable to sell the bonds if sixty per cent. could be obtained.

Meeting dissolved.

HENRY A. CHURCH, *Clerk.*

135 BOSTON, *Sept.* 4, 1874.

A meeting of the trustees was held at F. B. Crownishield's office at 11½ o'clock a. m., all the trustees being present.

The matter of what should be done with the funds now on hand, and the payment about to be made to the fund, was considered.

It was voted to advertise for proposals to purchase $15,000 Ogd. & Lake Champlain railroad sinking fund bonds, said proposals to be handed in by Sept. 12th, at 10 o'clock a. m., to the treasurer of the trustees. Mr. Pratt, owing to an engagement, was obliged to retire from the meeting.

On reading the record of the last meeting by Mr Crowninshield, he moved to strike out all relating to a loan to Elijah Smith, and to insert in the record.

A proposition was made by Elijah Smith or some other party to make some change in certain bonds of the Burlington and Southwestern railroad said to be pledged as collateral to a loan of about eighty-eight hundred dollars to said Smith. Whereupon Messrs. Pratt and Church having admitted that they had made said loan, Messrs. Crowninshield and Bartlett declared that they had never authorized or consented thereto, and that they would not consent to treat it as lawfully made by these trustees, and that Messrs. Pratt and Church must treat it as their own individual act, and declined in any way to treat or consider any such proposal.

Messrs. Crowninshield and Bartlett voted yea; Mr. Church voted nay.

On motion of Mr. Bartlett it was—

Voted, That no loan or investment be hereafter made except by a vote of a major number of the trustees duly recorded.

Adjourned to meet at Mr. Crowninshield's office, 12th inst., at 12 o'clock m.

HENRY A. CHURCH, *Clerk.*

BOSTON, *Sept.* 12, 1874—12 m.

A meeting of the trustees was held, all the members present. Mr. Crowninshield read aloud the contract with the Northern Transportation Co.

136 It was voted to purchase $15,000 Ogd. & Lake Champlain R. R. sinking fund bonds tendered for by J. W. Wheelwright at 99 and accrued interest.

Voted, To authorize the treasurer to buy $15,000 more at the same price or less any time up to and including next Monday, 14th inst.

HENRY A. CHURCH, *Clerk.*

BOSTON, *Feb.* 10, 1875.

A meeting of the trustees was held a- 11½ o'cl'k a. m., all being present.

Voted, That in accordance with the provisions of article seven in the contract of Feb. 24, 1871, between "Northern Transportation Company of Ohio, a corporation established under the laws of Ohio, party of the first part; J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, parties of the second part, and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, the Northern Railroad of New Hampshire, the Concord Railroad Corporation of New Hampshire, provided they execute this agreement; the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, parties of the third part, and the Ogdensburgh and Lake Champlain Railroad Company, the party of the fourth part," the party of the second part therein named be requested to assign and transfer to the trustees of the sinking fund all the debts and evidences thereof against the Northern Transportation Company and all securities therefor to be held as provided for, and which they may have acquired under the provisions of said seventh article.

HENRY A. CHURCH, *Clerk.*

BOSTON, *March* 1, 1875.

At a meeting of the trustees held at Mr. Crowninshield's office at one o'clock p. m., all being present but the clerk, Mr. Church, it was—

137 Voted, That the clerk draw such a draft as was drawn M'ch 1, 1873, upon the manager of the Boston & Lowell railroad for the amount due Dec. 31, 1874, to the trustees of the sinking fund.

Meeting dissolved.

HENRY A. CHURCH, *Clerk.*

BOSTON, *May* 18, 1875.

A meeting of the trustees was held at Mr. Crowninshield's office at 12 o'clock m., all being present.

Messrs. Pratt and Bartlett assented to whatever arrangement Messrs. Crowninshield and Church might make to purchase a few of the O. & L. C. sinking fund bonds.

Dissolved.

H. A. CHURCH, *Clerk.*

BOSTON, *Dec.* 29, 1875.

At a meeting of the trustees held at Mr. Crowninshield's office at 1 o'clock p. m., all being present, the subject of the amount in arrears to the sinking fund was considered and discussed. Messrs. Crowninshield and Bartlett thought it best to consult with Judge Abbott and Col. George, and report at a future meeting of the trustees.

Meeting was dissolved.

H. A. CHURCH, *Clerk.*

BOSTON, *July* 24, 1877.

A meeting of the trustees was held at the Ogdensburgh & Lake Champlain R. R. Co. office. Present: Messrs. Pratt, Church, and Bartlett. It was decided to buy some of the sinking fund bonds of the Ogd. & Lake Champlain R. R. with the balance on hand.

The sinking fund bonds held heretofore by the trustees as an investment were reported as all having been cancelled, amounting to $74,000 of said bonds.

Meeting was dissolved.

H. A. CHURCH, *Clerk.*

138 BOSTON, *Feb.* —, 1878.

A meeting of the trustees was held at the office of the Ogd. [&] Lake Champlain R. R. Co.

Present: Messrs. Talbot, Bartlett, Pratt, and Church.

Mr. Pratt was elected chairman of the board.

Deposition of George Stark.

The deposition of GEORGE STARK, of Nashua, N. H., taken in said Nashua April 11, 1883, under commission, upon interrogatories annexed thereto, before—

EDWARD E. PARKER,
Judge of Probate.

Direct interrogatories by SIDNEY BARTLETT, Esq., of counsel for complainant:

Int. 1. Are you one of the defendants in the above-entitled cause, and have you filed an answer therein as such defendant?*

Ans. Yes; I am defendant, and have filed my answer as such.

Int. 2. Whether or not at the time of the filing of plaintiff's bill, Oct. 16, 1880, or of your answer thereto, was there in the hands of yourself and J. Gregory Smith, trustees, and parties of the second part to the contract of Feb. 24, 1871, referred to in said bill and in your answer, any sum of money received under and in pursuance of said contract, or any other thing of any character, or of any value, applicable to the payment of the advances made by plaintiff under and in pursuance of said contract? If so, please describe the same.

Ans. No. There was not in my hands, as said trustee, or, to my knowledge, in the hands of my co-trustee, J. Gregory Smith, any money received under and in pursuance of said contract, or any other thing of any character or any value applicable to the payment of the advances made by the plaintiff, under and in pursuance of said contract, except certain certificates of the capital stock of the
139 Northern Transportation Company of Ohio, held under said trust, but of no value, having been foreclosed by mortgage.

Int. 3. If you shall, in answer to the foregoing interrogatories, have stated that you, as such trustee, have in your hands no such

* NOTE.—The cause referred to is entitled O. & L. C. R. R. Co. *v.* Northern Railroad.

sum of money or other thing of any value, or have stated on your information and belief that your co-trustee, J. Gregory Smith, has in his hands no such money or thing of any value, will you state whether or not you personally attended to receipts, and payments made, or in behalf of yourself and said Smith, as such trustees, and kept an account thereof, or whether the same was done by said Smith, or by both of you, or how otherwise?

Ans. The accounts of J. Gregory Smith and George Stark, trustees and parties of the second part in said contract, were kept by C. E. A. Bartlett (who was then the treasurer of the Boston and Lowell railroad), and by him rendered to the parties in interest.

Cross-interrogatories proposed by F. A. Brooks, Esq., in behalf of defendants:

Cross-int. 1. If you have stated in answer to plaintiff's interrogatories in this case that there were no funds in the hands of yourself and J. G. Smith, trustees under contract of Feb. 24, 1871, please state how much money ever came into your hands as trustees under said contract, and what disposition was made of the same by you.

Ans. No money ever came into the hands of J. Gregory Smith and myself as trustees under said contract, except as accounted for by said C. E. A. Bartlett, and referred to in my original answer of June 30, 1881.

Cross-int. 2. Also, in above event, state if you and Smith as such trustees ever rendered any account to the defendant and the other parties to said contract, for the use and disposition made by you of said trust funds; and if you say you did, then annex a copy of all such accounts rendered them by you, also stating whether or not such accounts were ever passed or settled as between you and the defendant in this suit.

Ans. Account was rendered by Bartlett as above stated; I cannot annex a copy except as through him. My connection with the matter terminated, as I suppose, by the practical completion of the trust.

I am not aware of any other formal settlement.

140 Cross-int. 3. Have not you and J. G. Smith, trustees under said contract, been released by the plaintiff in this case from all accountability under said contract to the plaintiff, and from all liability to contribute to the sinking fund provided by said contract and administered by you in behalf of the defendant and others; did you never hear of such a release?

Ans. I do not know of any formal action of release, and have not supposed any to be necessary.

(Plaintiff objects to the foregoing third cross-interrogatory in behalf of the Nashua and Lowell Railroad Company, upon the ground that the same does not relate to, but is wholly disconnected with the subject-matter of the plaintiff's direct interrogatories, and not waiving said objection, puts *de bene esse*, the following interrogatory:)

Direct examination resumed:

Int. 4. Will you revise your answer to cross-int. 3, and state as to

each part thereof, whether the fact there stated is the subject of any written contract, or is shown by any writing; if so, will you produce such contract or writing?

Ans. Answer to cross-int. 3 seems to also answer this one.

GEO. STARK.

Evidence for defendants taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me—

FISHER AMES,
U. S. Commissioner.

Deposition of John C. Pratt.

Present: Sidney Bartlett, Esq., of counsel for complainant; J. H. Benton, Jr., Esq., of counsel for defendants.

Direct examination by J. H. BENTON, Jr., Esq., of counsel for defendants:

BOSTON, *Feb.* 1, 1882.

Int. 1. Mr. Pratt, what is your full name?

Ans. John C. Pratt.

141 Int. 2. What is your place of residence now, Mr. Pratt?

Ans. I reside in Boston.

Int. 3. Were you at one time president of the Ogdensburg and Lake Champlain railroad; and, if so, how long did you discharge its duties?

Ans. I was president of the road from the time of its reorganization, in 1864, to, I think it was 1878, I am not quite sure.

Int. 4. During what portion of that time did the Northern Transportation Company connect with and bring business to and take it from the Ogdensburg road?

Ans. The Northern Transportation Company was running its boats to Ogdensburg, when I took the road and continued to run until about the year 1876, until the boats went into the hands of the receiver.

Int. 5. Do you know whether or not there was a contract executed between the Ogdensburg and Lake Champlain Railroad Company and the Vermont and Canada railroad and the managers and trustees of the Vermont Central Railroad Company, purporting to be a lease of the Ogdensburg road, on the twenty-fourth day of February, 1870?

Ans. Yes, sir.

Int. 6. Whether or not at the same time there was executed to your knowledge a contract between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies of the first part, and the Northern railroad of New Hampshire, the Nashua and Lowell railroad, and the Boston and Lowell Railroad Corporations of the second part?

Ans. You ask me whether I know that such a contract was made I do, I was cognizant of it.

Int. 7. And whether or not to your knowledge there was at the same time executed by the parties of the first part to that contract, an assignment of it to the Ogdensburg and Lake Champlain Railroad Company?

Ans. There was.

Int. 8. Whether or not at the same time there was an agreement that the Concord Railroad Corporation named, as a party to the second contract above refered to, need not execute the same?

Ans. There was.

142 (It is agreed that the pamphlet hereto annexed, marked "Exhibit A," contains true copies of the contracts above referred to.)

Int. 9. At the time of the execution of this lease, of the accompanying line contract, and the assignment of the line contract as collateral security for the performance of the lease by the lessees, what proportion of the business of the Ogdensburg road came from its connection with the Northern Transportation Company?

(Objected to, as immaterial and incompetent.)

Ans. About one-half.

Int. 10. Are you able to state what proportion of the receipts of the Ogdensburg road for the two years preceding the lease were derived from this business by way of elevating, terminal charges, and car service?

(Objected to, as immaterial and incompetent.)

Ans. I can't divide exactly. No, I can't answer that question; I haven't the figures with me.

Int. 11. What part did you have, Mr. Pratt, in the negotiation which resulted in the lease of the Ogdensburg road to the Vermont and Canada and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies?

(Objected to, as immaterial and incompetent.)

Ans. I was chairman of the committee that conducted the negotiation.

Int. 12. Did the Ogdensburg road have any other security for the performance of that lease by the lessees, except the assignment of the line contract made at the time the lease was executed?

(Objected to, as immaterial and incompetent.)

Ans. They had no other security.

Int. 13. Was there or not after the execution of this lease and the assignment of the line contract as collateral security to it, any increase in the value of the stock and securities of the Ogdensburg road; and, if so, what?

(Objected to, as immaterial and incompetent.)

Ans. Soon after the lease was executed the stock advanced from 45 to 95, or about those figures in the market.

Int. 14. By the fifth article of said lease the lessees agree to pay

to the lessor $384,620, in each and every year for the term of
143 three years; the sum of $415,390 in each and every year thereafter for three years, and the sum of $446,160 per annum thereafter during the continuance of the lease. And by the fourth article of said contract between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central and the Vermont and Canada Railroad Companies, parties of the first part, and the Northern Railroad of New Hampshire, Nashua and Lowell railroad, and Boston and Lowell railroad, parties of the second part, it is agreed, that in order that security may be afforded by the party of the first part to said Ogdensburg and Lake Champlain Railroad Company under said lease, that the parties of the second part to the line contract will reserve and deposit with the manager of the Boston and Lowell railroad in Boston, to be paid by him to the Ogdensburg and Lake Champlain railroad, monthly, from the gross earnings belonging to the parties of the first part to said line contract, one-twelfth part of the payments to be made in any given year by said parties of the first to the Ogdensburg and Lake Champlain Railroad Company, under said lease, which payments are to be allowed and accounted for in the settlement between the parties to the line contract. Now, Mr. Pratt, I want to know whether the rent due to the Ogdensburg road under the lease was or was not paid to it according to those provisions of the lease, and of the line contract?

(Objected to, as immaterial and incompetent.)

Ans. It was paid in that way by the Lowell railroad until they defaulted.

Int. 15. Was it or not, to your knowledge, paid in that way through the Lowell railroad as long as it was paid?

(Objected to, as immaterial and incompetent.)

Ans. Yes, it was.

Int. 16. Will you state whether at any time after the making of this lease and collateral contract any information came to you as president of the Ogdensburg road with regard to a proposed transfer of the Northern Transportation Company boats from their connection with the Ogdensburg road to any other point; and, if so, state what that information was.

(Objected to, as immaterial and incompetent.)

Ans. In the winter of 1870–'71 I was informed that nego-
144 tiations were on foot between Mr. Chamberlain, president of the Northern Transportation Company, and parties in Montreal for the sale of his stock, involving a transfer of the boats from Ogdensburg to Montreal as their eastern terminal point.

Int. 17. What at the time were the relations or respective situations of the Ogdensburg road and the Grand Trunk road with reference to the through business to and from New England and the West?

(Objected to, as immaterial and incompetent.)

Ans. They were competitors for that business.

Int. 18. If the Northern Transportation Company boats had been transferred from their connection with the Ogdensburg road at Ogdensburg to a connection at Montreal, with what road would they then have connected for this business?

(Objected to, as immaterial and incompetent.)

Ans. Their natural connection would have been with the Grand Trunk, at Montreal.

Int. 19. Was or was not this information with regard to the proposed transfer of the Northern Transportation Company boats from connection with your road at Ogdensburg to the connection at Montreal brought to the knowledge of the directors of the Ogdensburg road at this time?

(Objected to, as immaterial and incompetent.)

Ans. It was.

Int. 20. Was it or not considered and discussed by your board?

(Objected to, as immaterial and incompetent.)

Ans. It was.

Int. 21. What effect did you and your board then believe the transfer of the Northern Transportation Company boats from a connection with the Ogdensburg road at Ogdensburg to this connection at Montreal would have upon the interests of the Ogdensburg road?

(Objected to, as immaterial and incompetent.)

Ans. We thought that it would be disastrous to the interests of our road.

Int. 22. In what way did you believe it would injure the Ogdensburg road?

(Objected to, as immaterial and incompetent.)

Ans. By reducing our earnings to that extent as to render the parties to our lease unable to pay our rent.

145 Int. 23. Did you and your board consider and discuss any measure to be taken to prevent the Northern Transportation Company boats from being transferred from their connection with your road during the winters of 1870–'71; if so, what is it?

(Objected to, as immaterial and incompetent.)

Ans. Simultaneously with the knowledge that came to us of the proposed transfer of these boats to Montreal, came a proposition from the managers of the connecting line, Vermont Central, and other roads, to issue a million of bonds for the purpose, as was alleged, of obtaining the control of the stock of the Northern Transportation Company to hold them to Ogdensburgh as a terminal point. That proposition was submitted by the board and discussed by them.

Int. 24. What part did you have, if any, in the negotiations which resulted in the making of the so-called Northern Transportation Company contract, that is to say, the contract which was made on

the twenty-first day of February, 1871, a copy of which is annexed to the plaintiff's bill, under which the Ogdensburg road agreed to advance money to secure the continuance of the connection of the Northern Transportation Company boats with its road at Ogdensburg?

(Objected to, as immaterial and incompetent.)

Ans. I was chairman of the committee to conduct the negotiation; everything being submitted to the board from day to day, however.

Int. 25. If in the course of these negotiations, which you say were reported to the board from day to day, you and they came to any belief or conclusion as to what would be the result or the effect upon the connection of the Northern Transportation Company boats with your road if that contract was not made, state what that belief or conclusion was.

(Objected to, as seeking from the witness the belief of others than himself, and as being otherwise immaterial and incompetent.)

Ans. The board were very reluctant to issue the bonds that we were asked to issue by the Lowell road, but the pressure was so strong upon us under an implied threat that our lease, which we considered of very great value, would be broken, and the additional fact, of which we were well aware, that the earnings of our road would be so reduced by the transfer of the boats as not only to be
146 insufficient to pay the rent of our road, but would also reduce our earnings to that extent that, if our lease was broken, would render us unable to earn money sufficient to pay dividends. These facts, together with the fact that our counsel told us that the contract itself created no legal obligations, in his opinon, on either party, rendered us very reluctant to enter into the contract.

(Answer objected to, as being incompetent and irresponsive.)

Int. 26. (Int. 25 repeated.)

(Same objections as to int. 25.)

Ans. We came to the conclusion that the dissolution of that connection would be disastrous to the interests of the road.

Int. 27. Did you come to any conclusion or belief as to whether or not the connection would be broken if the contract was not made; and, if so, what conclusion or belief did you come to on that point?

(Same objections as to the last interrogatory.)

Ans. We made up our minds that the connections would be broken unless we entered into this contract.

Int. 28. Did you and your board, before making this contract of Feb. 21, 1871, come to any conclusion as to what would be the effect upon your lease if this connection were broken up; if so, what was that conclusion?

(Same objections as to the last interrogatory.)

Ans. We came to the conclusion that our lease would be broken if these connections were broken.

Int 29. Had your road incurred any expense in making provision for the management and transportation of the business which came from its connection with the Northern Transportation Company boats; and if so, will you state, generally, what?

(Objected to, as immaterial and incompetent.)

Ans. Shortly after we came into possession of the road in 1865 we added very largely to our equipment by buying and building seven or eight hundred freight cars to accommodate this through business; we also erected a large and substantial brick elevator, capable of holding 600,000 bushels of grain.

Int. 30. Can you state generally what proportion of your equipment was provided and necessary for the transportation of this through business? Can you state generally about what proportion?

(Objected to, as immaterial and incompetent.)

147 Ans. I should think three-quarters of our equipment was used for our through business when navigation was open.

Int. 31. Did you have any through business when navigation was closed and the boats of the Northern Transportation Company stopped running?

(Objected to, as immaterial and incompetent.)

Ans. No; we did not.

Int. 32. Could the Ogdensburg road, at the time the contract of Feb. 24, 1871, was made, have earned any dividends without its through business?

(Objected to, as immaterial and incompetent.)

Ans. I don't think they could.

Int. 33. Did it or not during the winter months when the through business was shut off by the stoppage of navigation earn more than its ordinary expenses?

(Objected to, as immaterial and incompetent.)

Ans. No; and frequently it was the case our earnings were less than our expenses in the months of January, February, and March.

Int. 34. You have stated that you and your board believed that the connection of the Northern Transportation Company boats with your road would be broken if the contract of Feb. 24, 1871, was not executed by your road, and that if that connection was broken the earnings of the road would not be sufficient to enable the lower roads to reserve and pay the sums necessary to pay the rent under your lease, and the lease would be broken; did you know or were you informed at that time whether the matter of the obligations of the parties to the line contract, collateral to the lease, in case this connection was broken, was under consideration by the parties to that contract?

(Objected to, as immaterial and incompetent.)

Ans. I received this letter, which is dated Feb. 15, 1871, and signed by J. G. Abbott and John H. George. The following is a copy of the original letter produced before the magistrate:

"BOSTON, *Feb'y* 15, 1871.

"JOHN C. PRATT, Esq.

"DEAR SIR: We have been requested by parties in interest to examine the contract between the Ogdensburg & Lake Champlain Railroad, and railroads between Rouse's Point and Boston, with the view of forming an opinion as to the duty of the first-named railroad to issue its bonds upon proper security for the purpose of retaining and securing the business contemplated under said contract.

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"We have made such examination sufficiently to express our decided judgment that the refusal of the Ogdensburg road as above, in the case submitted to us, raises questions most serious in their consequences, and possibly involving the release of other parties from the obligations of said contract, a contingency which we think deserves the very careful consideration of those who desire the continuance of said contract.

"We further think that a reference of the questions submitted to us to the legal adviser of the O. & L. C. R. R'd will be likely to lead to such action as will render any steps for a solution of the legal relations of the parties unnecessary.

"Yours, truly,

(Signed) "J. G. ABBOTT.
"JOHN H. GEORGE."

(Answer as well as interrogatory objected to, as immaterial.)

Int. 35. Do you know who J. G. Abbott and John H. George represented?

(Objected to, as immaterial and incompetent.)

Ans. Yes, I do; Mr. Abbott and Mr. George, while they appeared for the Lowell road, yet, in this negotiation, they acted for the Central Vermont, and for all the parties in interest, except the Ogdensburg road.

Int. 36. Was not this letter submitted to your board?

(Objected to, as immaterial and incompetent.)

Ans. It was.

Int. 37. Was or not the question referred to in this letter submitted to your counsel?

(Objected to, as immaterial and incompetent.)

Ans. The letter itself was submitted to them.

Int. 38. Who were your counsel at that time; I mean the counsel of the Ogdensburg road?

(Objected to, as immaterial and incompetent.)

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Ans. George O. Shattuck, of Boston, and Mr. Hasbrouck, of Ogdensburg.

Int. 39. Now, Mr. Pratt, were all these questions about which you have spoken, with reference to whether the connection of the boats with your road would be broken or not, and what the effect of breaking such connection would be upon your lease and upon the value of your road and property, aside from your lease, brought to the attention of and discussed by your board before the contract of Feb. 24, 1871, was executed?

(Objected to, for form and substance.)

Ans. They were brought to the attention of the board and discussed by the directors.

Int. 40. As a matter of fact, what interest did the Ogdensburg road have in making the contract of Feb. 24, 1871, by which it agreed to make certain advances to preserve the connection of the boats with its road, won't you state?

(Objected to, as immaterial and incompetent.)

Ans. Why, we had the greatest possible interest in making connection with the Northern Transportation Company, as I stated this morning. Our interest was to maintain the connection with the Northern Transportation Company, having Ogdensburg for its eastern terminal point. The whole freight business of the Ogdensburg for the year ending April 1, 1869, through and local, including freight, terminal charges, elevating, and car service, was $850,000. The earnings from through freight, East and West, going to Ogdensburg and coming from, was about $500,000. To have lost that business by the withdrawal of all connection with the Northern Transportation Company would have been fatal to the interests of the road. And for that reason we made the contract that we did. I might add, speaking of the motive why we made that contract at that period, that it would have been wiser and better for the Ogdensburg road to have contributed $600,000 outright than to have broken the connection with the Northern Transportation Company.

Cross-examination by SIDNEY BARTLETT, Esq., of counsel for complainant:

Cross-int. 41. At what time did you cease to have any connection with the Ogdensburg road?

150 Ans. I think it was 1878; 1877 or 1878.

Cross-int. 42. Did you resign, or on what account? Why did you leave the road?

Ans. I failed to be re-elected.

Cross-int. 43. Was there or not, in fact, a discord or difference of views between you and the managers of the road?

Ans. There was a difference between some of the directors and myself.

Cross-int. 44. You have had no interest in it, and nothing to do with it since?

Ans. No, sir.

Cross-int. 45. Did you fail of election, and who was the candidate against you?

Ans. Mr. Averill, of Ogdensburg.

(Adjourned.)

FEB. 7, 1883.

WITNESS says: I desire to make the following corrections in my testimony taken the other day:

In answer to int. 25, I say: "The board were very reluctant to issue the bonds that we were asked to issue by the Lowell road." I meant to say, "that we were asked to issue by the Central Vermont and other connecting roads." The Central Vermont railroad's name at that time was the Vermont Central.

I wish to state, in reference to the questions that were asked me on cross-examination, that there was always most perfect harmony in our board on all questions that came before it until the late manager of the Connotton Valley railroad, Mr. Hungerford, made his appearance there. From that moment there was discord.

Direct examination resumed:

By Mr. BENTON:

Int. 46. At what time was that?

Ans. I think it was the winter of 1876 or 1877.

Int. 47. Was there any discord in your board about the execution of this contract of Feb. 24, 1871?

Ans. There was no discord. The board were unanimous, with the exception of one man; one vote.

151 Int. 48. To your knowledge did the Northern railroad make any request of the Ogdensburg road to issue the bonds you have spoken of?

(Objected to.)

Ans. I do not recollect that the Northern railroad appeared in the negotiation by counsel or by their officers.

Int. 49. Whether or not to your knowledge, as a matter of fact, this contract was executed by the Northern railroad some six months or more after it was actually executed by the other parties and after the date of it?

(Objected to for form and substance, both.)

Ans. I do not recollect about that.

JOHN C. PRATT.

Attest: FISHER AMES,
U. S. Commissioner.

EXHIBIT A.—*Fisher Ames, U. S. Commissioner, February* 1, 1883

Articles of agreement between the Ogdensburg and Lake Champlain Railroad Company, a corporation organized under the laws of the State of New York, party of the first part, and the Vermont and Canada railroad, a corporation organized under the laws of the State of Vermont, and the managers and trustees of the Vermont Central Railroad Company, who have possession

and management of the Vermont Central railroad by virtue of decrees of courts and the laws of the State of Vermont, parties of the second part.

Whereas the aforementioned railroads form one connecting line of railroad track from the foot of ship navigation of the Great Lakes, at Ogdensburg, to White River Junction and Windsor, Vermont, and the traffic and business of each of the railroads is so intimately connected, that it can be carried on and conducted
152 to the greatest advantage of all concerned by having all the said roads under one management, with proper arrangement for an equitable division of the earnings; and

Whereas a consolidation of said railroads may ultimately be found desirable for the benefit of the public and of the stockholders of all the roads, as provided for by the act of the Legislature of the State of New York, passed May 29th, 1869, entitled "An act authorizing the consolidation of certain railroad companies;" but that a temporary arrangement (within the terms of said act) is most desirable for all interests, until it can be clearly seen whether full consolidation to the extent authorized by said act will be advantageous to all parties:

Now, therefore, it is covenanted between said parties jointly and severally, as follows:

Article First.

That the parties of the second part, either by themselves or in connection with other railroad corporations, by virtue of business contracts, regulating the business from said Ogdensburg and Lake Champlain Railroad Company, shall have the possession and control and use of the Ogdensburg and Lake Champlain railroad with its branches and all its locomotives, cars, engines, and all other rolling stock, and all its tracks, elevators, switches, and all its station houses, storehouses, offices, and all its other buildings of every description, and all the lands and real estate of the party of the first part with all its rights of way and passage, excepting, however, and expressly reserving all those certain wood lands and all those certain village lots, &c., described in the schedule hereunto annexed and marked "Schedule A"; and the party of the first part reserve its interest in the steam fire engine in the city of Ogdensburg.

Article Second.

All the gross receipts of and from the business and traffic of or upon the Ogdensburg and Lake Champlain railroad after the first day of March, A. D. 1870, shall belong to the parties of the second part, and be collected by the managers aforesaid, and disposed of as the said parties of the second part shall direct.

153 Article Third.

The Ogdensburg and Lake Champlain Railroad Company hereby sells to the party of the second part all the fuel, lumber, timber,

new ties, oil and waste, and stationery, and all other things of a like character furnished for use upon its road, and also assigns to the party of the second part all existing contracts they have for any such property; and the parties of the second part agree jointly and severally to pay for the same at cost, and all the rails owned by the Ogdensburg and Lake Champlain Railroad Company, not in the tract at the time this contract goes into effect, shall be taken by the parties of the second part and paid for by them at a valuation to be appraised by a person to be appointed by the Ogsdenburg and Lake Champlain Railroad Company, with the superintendent of the Vermont Central Railroad, and if they disagree in any respect all their cases of disagreement shall be determined by an umpire whom they shall choose, and whose decision shall be final; and the cost of the other articles shall be determined by the same persons in the same manner. The parties of the second part jointly and severally agree to pay the parties of the first part, its successors and assigns, for all the property mentioned or coming within the terms of this article, at their office in Boston on the delivery thereof, and no delivery shall be considered complete until the payment is made.

And the parties of the second part assume and agree to fulfil all existing agreements of the party of the first part for the purchase of supplies and for transportation. All such agreements are described in "Schedule B," hereto annexed.

Article Fourth.

The parties of the second part jointly and severally covenant and agree to and with the parties of the first part, its successors and assigns, to keep up and maintain in good order and condition, by repairs and renewals, as the same may be needed, all the present equipment of the party of the first part, and to add such new cars and engines as may be necessary to provide for waste and depreciation as the same may from time to time occur; to mark distinctly and in the usual manner all such new locomotives and other rolling
154 stock, to denote that they appertain and belong to the Ogdensburg and Lake Champlain Railroad Company, and so deliver them upon the road of the party of the first part as their property, subject only as their other property to the terms of this agreement, and all such rolling stock shall be so, as aforesaid, distinctly marked before leaving the machine shops or place of manufacture, and they will also put in the track of the party of the first part all new iron or a proportionate quantity of steel, ties and other material requisite to keep the track and road always up in good condition, and not less than twelve hundred tons of good new iron as a minimum, in addition to all repaired iron, in any year, and will increase the annual amount of new iron in proportion to the increase of the tonnage, in addition to all the repaired iron, and to add to the ballast, every year, so much as may be necessary to keep it in as good and that all the railroad tracks, turn-outs, docks, bridges, buildings, order as it now is, and to keep open and in good condition all the drains, shops, tools, machinery, locomotives, cars, rolling stock, equipment,

and everything herein named or not named, which is taken, possessed, or controlled by the parties of the second part, or any of them, or any of their officers, successors, or assigns, by virtue of this contract, shall be kept in repair, restored and returned to the party of the first part, its successors or assigns, in as good and serviceable condition as at the date when this agreement is to go into operation. Also, that no fire wood or ties cut in either of the counties of St. Lawrence, Franklin, or Clinton, shall be transported by the parties of the second part, without the consent of the parties of the first part, off from the Ogdensburg and Lake Champlain railroad at less than the regular local price for lumber and bark from the same points.

Article Fifth.

The said parties of the second part agree jointly and severally to and with the party of the first part, its successors and assigns, to pay to the treasurer of the party of the first part, at his office, in lawful currency of the United States, for the considerations herein mentioned, the sum of three hundred and eighty-four thousand six hundred and twenty dollars ($384,620) in each and every year, for the term of three years from and after the first day of March
155 next, and the sum of four hundred and fifteen thousand three hundred and ninety dollars ($415,390.00) each and every year thereafter for three years, and the sum of four hundred and forty-six thousand one hundred and sixty dollars ($446,160.00) per annum thereafter, so long as this contract shall continue; and each of the said payments for each of the years shall be made in equal monthly payments, commencing on the first day of April in each year; and whereas the said amounts are intended to provide, among other things, for a dividend upon the common stock of the party of the first part, and upon the outstanding second mortgage bonds, which are by law convertible into such common stock, and the whole of said stock and outstanding bonds is three million seventy-seven thousand dollars; and whereas a portion of said bonds amounting to about twenty thousand dollars have not been converted and are lost or in possession of parties unknown to the parties of this contract, therefore it is agreed that all the dividends upon or in respect to said outstanding bonds which shall not be called for within ten days of the respective days of payments of dividends shall be refunded to the party of the second part, or their successors or assigns, on demand, but if the dividends are lawfully demanded, the parties of the second part shall pay the same, on demand, at any time thereafter.

Article Sixth.

The parties of the second part jointly and severally agree to and with the party of the first part that, in addition to the foregoing, they will pay all taxes and assessments which may be imposed by lawful authority upon the property, real or personal, the use and control whereof is hereby given to the parties of the second part, and also all United States Government taxes on the gross receipts of

the road of the party of the first part, and upon all dividends and interest which may be paid by the party of the first part as they shall become due; that they will fulfill all obligations of the party of the first part specified in Schedule B, and assume all the obligations of the parties of the first part, either by statute or at common law, as common carriers, warehousemen, or otherwise, and will indemnify and save harmless the party of the first part from all costs, damages, or loss by reason of any failure to fulfill said obli-
156 gations, and by reason of any claim that may be made for any neglect, accident, or default happening upon or in connection with the road of the parties of the first part, and save the party of the first part, and its successors and assigns, from all loss, damages, costs, and expenses for or by reason of anything to be done or omitted on its part, under its charter and existing laws, from and after the day this contract goes into effect, except that this article shall not apply to any demand or claims against the party of the first part for past transactions, or for anything for which the consideration is passed. And the parties of the second part, and each of them, shall have the right to use the name of the party of the first part in bringing any actions and in making any defences, and the parties of the second part will fulfill and perform all the covenants and agreements and obligations of the parties of the first part in respect to keeping up and maintaining the equipment which is mortgaged or held in any way to secure the equipment bonds and other expenses connected therewith.

Article Seventh.

The said parties of the second part covenant and agree to pay, in addition to the foregoing, for the actual expenses of maintaining the organization of the Ogdensburg and Lake Champlain Railroad Company, not exceeding the sum of fifteen thousand dollars ($15,000) per annum, in equal monthly payments, it being agreed that the officers of the Ogdensburg and Lake Champlain railroad, whose compensation shall be paid therefrom, shall render such service and give such information, in connection with the business of the road, as may be required of them.

Article Eighth.

The said parties of the second part jointly and severally agree to and with the party of the first part, its successors and assigns, to keep policies of insurance in full force and effect upon all the buildings, bridges, and docks of the party of the first part, put in under this contract, to the extent at least of two-thirds of their value, and to have such policies written for the benefit of whom it may concern, and referring to the interests of the parties hereto. They
157 will keep up and in good repair all buildings, docks, fences, and all other structures, and rebuild the same whenever burned or destroyed, and, in case of loss, all sums recovered from the insurance companies, on existing or future policies, shall enure to the benefit of the parties of the second part, and shall be expended in replacing or repairing the structures burned.

Article Ninth.

The parties of the second part shall, whenever requested by the party of the first part, furnish a car and transport therein the board of directors of the party of the first part, or a committee thereof, free of cost, over the road of the party of the first part and back, giving them suitable time and opportunity to examine and see that this contract is being fulfilled, not exceeding four times in any one year.

Article Tenth.

All the tracks, buildings, bridges, locomotives, cars, and all rolling stock, and all other property of the party of the first part, the use whereof is taken by the parties of the second part, shall, as soon as practicable, be carefully examined, inventoried, and described and appraised by two persons, one to be chosen by the Ogdensburg and Lake Champlain Railroad Company and one by the Vermont Central trustees; and if upon any points they differ they shall appoint an umpire, whose determination shall be conclusive; and at the termination of this contract an inventory and description and appraisal shall be made in the same manner of the same and substituted property by persons similarly appointed by said parties or their successors, who shall determine whether all such property is then in as good, or better, or worse condition of efficiency, and shall appraise the value of the difference, if any, and the difference shall be equalized by payment from one part to the other, as the case may require.

If the two appraisers shall not agree within fifteen days on an umpire, one shall be appointed by the supreme court of the State of New York in the fourth judicial district, upon the application
158 of either party, and if either party neglects for ten days after request to appoint an appraiser, the other shall be appointed by said court. Said appraisals to be made on the valuation in gold as a basis.

Article Eleventh.

In case the party of the first part shall at any time consider that the parties of the second part have in substantial respect failed to fulfil the terms of this contract on their part, the party of the first part may apply to the supreme court, in the State of New York, upon affidavits, and upon not less than thirty days' notice to the parties of the second part, to be served personally upon one of their managers, or left at their principal office in Vermont, properly directed to such manager, for an order or injunction to restore the first party to the possession and control of all the property embraced in and under this contract; and if upon such application the court shall decide in their favor, they shall be immediately restored to such possession, unless the parties of the second part shall, under the direction of said court, give to the first party full and ample security to pay any judgment which shall be obtained in any regular action which said first party may obtain for such failure to fulfil the terms of the contract aforesaid, together with any and all costs and ex-

penses and reasonable charges of counsel by reason of such failure, and full damages for any delay which may result to the first party by reason of deferred dividends or otherwise, including interest on deferred dividends, caused by the failure aforesaid, at the rate of eight per cent. per annum, and if upon the final hearing of said application the court shall determine adversely to the application of the said party of the first part, then the said party of the first part shall pay to the said party of the second part any and all costs growing out of said application, and full damages which may result to the said parties of the second part in the premises.

The provisions of this section are not intended to limit or control any rights or remedies of either party growing out of any violation of the provisions of this contract by either party, but such rights and remedies shall remain open to either party as fully as they would be if the provisions of this section were omitted from this contract.

159 Article Twelfth.

Each of the parties covenants to and with each of the others jointly and severally that they will hereafter and at all times make and execute all such further covenants and agreements as counsel learned in the law may advise necessary to carry into effect the true intent and purpose of this contract; and should any further legislation be deemed requisite, will endeavor by all proper means to procure such legislation to carry this contract into effect, and see that a more perfect union may be made, if it shall be found desirable for the promotion of their mutual interests; and the expense of all such proceedings, if done at the request of the parties of the second part, shall be paid by them. It is understood that in case of a large increase of the business of the Ogdensburg and Lake Champlain railroad, requiring, in the estimation of both parties, increased facilities beyond those now existing, the Ogdensburg and Lake Champlain Railroad Company will, so far as they legally can, increase their capital stock or issue their bonds, for the purpose of providing funds for such increased facilities, the parties of the second part paying the dividends on such stock, or interest on such bonds, at not less than eight per cent. per annum, free of Government tax.

This contract shall take effect and be in force from and after the date hereof, and shall continue in force for the full term of twenty years from and after the first day of March, 1870, except that the gross earnings of the road between the date hereof and said first of March shall belong and be paid to said first party, said first party paying the expenses, and the specific compensation provided to be paid herein shall commence on said first day of March.

In testimony whereof, John C. Pratt, president of the Ogdensburg and Lake Champlain Railroad Company, by the authority and direction of its board of directors, hath hereunto set his hand and the name of said company and affixed the seal thereof; and John Porter, the vice-president, and Samuel Atherton, of the directors of the Vermont and Canada Railroad Company, by authority of the board of directors of said last-named company, have hereunto set their hand and the name of said company and affixed the seal thereof

and Lawrence Brainard and Joseph Clark, trustees, and John
160 Gregory Smith, trustee and one of the managers, and Benjamin P. Cheney, one of the receivers and managers of the Vermont Central railroad, have hereunto set their hands and seals, on this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy.

The foregoing document consists of twenty-three sheets, numbered from one to twenty-three, consecutively.

THE OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY, [SEAL.]
(Signed) By JOHN C. PRATT, *Pres't.*

[U. S. revenue stamp.]

THE VERMONT & CANADA RAILROAD COMPANY,
(Signed) By JOHN PORTER, *Vice-President.* [SEAL.]
" AND SAMUEL ATHERTON, *Director.*

[U. S. revenue stamp.]

THE TRUSTEES AND MANGERS OF VT. CENTRAL AND VERMONT & CANADA RAILROADS,
(Signed) J. GREGORY SMITH. [SEAL.]
(Signed) B. P. CHENEY. [SEAL.]

Sealed and delivered in presence of—
(Signed) G. W. CUMMINGS, *Witness.*

SCHEDULE A.

Description of lands referred to in the foregoing contract, reserved by the Ogdensburg and Lake Champlain Railroad Company, and the use or control of which is not granted to the parties of the second part.

First. At Ogdensburg, all the certain city lots, bounded on the south by Ford street and on the north by a line parallel with the railroad, and distant five rods south from the center of the railroad.

Second. At Potsdam Junction, six village lots on Main
161 street, 30x100 feet each, as per map of railroad grounds at that place, made by C. Hutchins in 1870.

Third. At Malone, one lot on Elm St., with dwellings, situated north and west from brick depot, including all the lands within ten feet of the northwest side of said depot, and running to the river; also all village lots mapped out on a map of lots made by T. B. Tate, Esq., for the railroad company, most of the lots being northwest of the round-house; also about five acres of land east of Malone village.

Fourth. In the towns of Clinton and Ellenburgh, about twenty-four hundred and fifty acres of land, being the same lands purchased of L. S. Carter, Esq., of Ellenburg.

Fifth. At Rouse Point, all village lots on Canada, Church, and Pratt streets, as mapped out on a map made for the company by T.

B. Tate, Esq.; also lands west of Church street, between the railroad fence and Mr. Heaton's lands, being about fifteen acres; also all the lots or land on east side of Canada street to cattle yard, running east from said street one hundred feet, no more.

SCHEDULE B.

The contracts and agreements referred to in the foregoing instrument are only contracts and agreements in the regular course of the business of the railroad for the purchase of fuel and ties and regular supplies for future use, and for transportation of freight from local points on this road.

This agreement, made the twenty-fourth day of February, in the year one thousand eight hundred and seventy, between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central and Vermont and Canada Railroad Companies, parties of the first part, and the Northern Railroad of New Hampshire, the Concord Railroad Corporation of New Hampshire, the Nashua and Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, respectively, parties of the second part, witnesseth:

162 Whereas by a contract this day executed between the said first parties and the Ogdensburg and Lake Champlain Railroad Company, the railroad and property of said last-named company has passed into the control and possession of said first parties, whereby the business of said railroad becomes business originating with and belonging to said first parties; and

Whereas, as the consideration for the agreements on the part of said Ogdensburg and Lake Champlain Railroad Company, contained in said contract, the said first parties have agreed to pay certain sums, in the currency of the United States, to said Ogdensburg and Lake Champlain Railroad Company in each year during the continuance of said contract, viz., three hundred and eighty-four thousand six hundred and twenty (384,620) dollars in each and every year for the term of three years from and after the first day of March next, and the sum of four hundred and fifteen thousand three hundred and ninety (415,390) dollars each and every year thereafter for three years, and the sum of four hundred and forty-six thousand one hundred and sixty (446,160) dollars per annum thereafter so long as this contract shall continue, all such payments being subject to the conditions and limitations provided for in such contract, to which reference is made; and

Whereas the said contract, by reason of existing business connections and otherwise, is expected to bring increased business and revenue to all parties hereto:

Now, with the view of affording greater facilities to the public of facilitating settlements and fixing the terms of connection, and all other matters with reference to any and all business between any and all points on said Ogdensburg and Lake Champlain railroad,

and any and all points on the railroads of the parties hereto, or the railroads connecting therewith, it is agreed as follows:

First. The said Ogdensburg and Lake Champlain railroad shall be run, operated, and managed in a prudent and judicious manner, so as to maintain, and, if possible, to increase its efficiency as a business connection and feeder of the roads of these parties respectively.

Second. The parties of the first part agree that the parties of the second part shall have an equal voice and control with said first parties in the management of said Ogdensburg and Lake Champlain
163 railroad in all respects, and with this view such management shall be placed in the hands and control of an executive committee of two persons, one to be appointed by the parties of the first part, and one by the parties of the second part; and, in case of disageeement between said executive committee, the points of difference shall be referred to the board of six directors named in the contract of 1870 between these parties in reference to the business of the Vermont Central and Vermont and Canada railroads.

Third. For the purpose of determining the question of excess or deficiency as hereafter provided in the working of said Ogdensburg and Lake Champlain railroad under the contract herein referred to, the divisions of joint receipts between the Ogdensburg and Lake Champlain railroad and these parties, or other railroads, shall be computed on the basis in use during the year 1869, unless otherwise mutually agreed on between these parties, and it is agreed that the entire excess or deficiency of net earnings over and above or below the expenses and payments to be made as provided in said contract, and the expenses of operating said road shall be divided among all the parties hereto in exact proportion to the gross receipts of each of said parties from the business between any and all points on said Ogdensburg and Lake Champlain railroad, and any and all points on or beyond the railroads of the party hereto, and the liability of each of the parties hereto for allowance for such deficiency shall be limited to its said gross receipts for its own road, and said excess or deficiency may from time to time be merged by the respective parties in their accounts of receipts from such business.

Fourth. It is further agreed, in order that security may be afforded by the parties of the first part to said Ogdensburg and Lake Champlain Railroad Company under the contract aforesaid between them, that the parties of the second part severally will reserve and pay, as hereinafter provided, monthly, from the gross earnings belonging to the parties of the first part collected by them on account of any business to and from the Ogdensburg and Lake Champlain railroad, in currency of the United States, one-twelfth part of the payments to be made in any given year by the first parties to the Ogdensburg and Lake Champlain Railroad Company under the contract between them before mentioned, and such monthly payments
164 are hereby authorized, and shall be allowed and accounted in the settlement between the parties hereto.

And the parties of the second part, in order to define the manner in which the payment aforesaid shall be made to the Ogdensburg

and Lake Champlain Railroad Company, hereby severally agree to deposit with the manager of the Boston and Lowell railroad, at Boston, on or before the last day of each and every month, from funds in their hands belonging to parties of the first part, collected on account of business to and from said Ogdensburg and Lake Champlain railroad as aforesaid, the amount of the monthly payments due from the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Company to the Ogdensburg and Lake Champlain railroad, and the treasurer of the Ogdensburg and Lake Champlain railroad is hereby authorized to draw the same, on the first day of each and every month, on the manager of the Boston and Lowell railroad, who is hereby authorized to pay the draft.

Fifth. This contract shall take effect on and from the first day of March, 1870, and continue in force twenty years thereafter, or during the continuance of the contract herein first referred to.

Sixth. It is further agreed that the parties of the first part may, if they desire, assign this contract to the Ogdensburg and Lake Champlain railroad as security for the performance of the contract entered into between said first parties and said Ogdensburg and Lake Champlain Railroad Company.

Seventh. The provisions of the contract of 1870 between these parties, relating to the business of the Vermont Central and Canada railroads, so far as they relate to the direction of business, shall apply to and control the business of the Ogdensburg and Lake Champlain railroad under this contract.

Eighth. The contract between the Vermont and Canada Railroad Company and managers and trustees of the Vermont Central and the Ogdensburg and Lake Champlain Railroad Companies before mentioned shall not be modified, changed, or abrogated with either the consent or procurement of said first parties, without the prior written consent of said second parties, nor shall the capital stock or securities of the Ogdensburg and Lake Champlain railroad be increased for the purpose of enlarging the equipment, as provided in contract first herein referred to, or otherwise, without the prior written consent of the second parties hereto.

Ninth. Whenever any claims of said Ogdensburg and Lake Champlain Railroad Company against the trustees and managers of the Vermont Central and Vermont and Canada railroads, growing out of the contract between them herein referred to, shall be definitely established by judgment or otherwise, the parties hereto do further severally agree that — will on thirty days' notice severally reserve the amount of said claim from the gross receipts of the business to and from the Ogdensburg and Lake Champlain Railroad Company, in their hands respectively, as provided in article four of this contract, and pay the same to the manager of the Boston and Lowell Railroad Corporation, in addition to the sum provided by said article to be paid monthly to said manager; and said additional sum so reserved and paid shall be subject to the draft of said Ogdensburg and Lake Champlain Railroad Company, as is provided in said article.

In witness whereof, the parties have hereunto set their hands and

the seals of said corporations respectively, this twenty-fourth day of February, 1870.

THE VERMONT AND CANADA RAILROAD COMPANY,
(Signed) By JOHN PORTER, *Vice-Pres.*
(Signed) SAMUEL ATHERTON, *Director.* [SEAL.]

THE TRUSTEES AND MANAGERS OF VERMONT CENTRAL AND VERMONT AND CANADA RAILROADS,
(Signed) J. GREGORY SMITH. [SEAL.]
(Signed) B. P. CHENEY. [SEAL.]

THE BOSTON AND LOWELL RAILROAD CORPORATION,
By their committee duly authorized—
(Signed) F. B. CROWNINSHIELD.
(Signed) J. G. ABBOTT.
(Signed) GEO. STARK.

THE NASHUA AND LOWELL CORPORATION,
By their committee duly authorized—
(Signed) F. B. CROWNINSHIELD,
(Signed) GEO. STARK.

166 THE NORTHERN R. R.,
By their comm. duly authorized—
(Signed) ONSLOW STEARNS.
(Signed) URIEL CROCKER.

In consideration of one dollar, paid by the Ogdensburg and Lake Champlain Railroad Company, the receipt whereof is hereby acknowledged by the Vermont and Canada Railroad Company, and the trustees and managers of the Vermont Central railroad, hereby assign and transfer to said Ogdensburg and Lake Champlain Railroad Company, all their interest in the within written contract, as collateral security for the performance on their part of all stipulations contained in the agreement of even date herewith, between said Vermont and Canada Railroad Company and said trustees and managers, and said Ogdensburg and Lake Champlain Railroad Company.

In witness whereof, the said Vermont and Canada Railroad Company has caused its corporate seal to be hereto affixed, and this instrument to be signed by its vice-president and Samuel Atherton, one of its directors, and said trustees and managers have hereto set their hands and seals this twenty-fourth day of February, A. D. one thousand eight hundred and seventy.

THE VERMONT & CANADA RAILROAD COMPANY,
(Signed) By JOHN PORTER, *Vice-President.* [SEAL.]
" SAMUEL ATHERTON, *Director.*

[U. S certificate stamps, int rev]

THE TRUSTEES AND MANAGERS OF VT. CENTRAL AND VERMONT & CANADA RAILROADS,
(Signed) J. GREGORY SMITH.
(Signed) B. P. CHENEY. [SEAL.]

It is hereby agreed by and between the Vermont and Canada Railroad Company, the trustees and managers of the Vermont Central Railroad Company, the Northern railroad of New Hamp-
167 shire, the Nashua and Lowell Corporation, and Boston and Lowell Railroad Corporation, as follows:

Whereas a contract of this date has been drawn to be executed by the parties hereto in conjunction with the Concord Railroad Corporation, and to be assigned to the Ogdensburg and Lake Champlain Railroad Company as collateral security for the performance of a contract of this date between the Vermont and Canada Railroad Company and the trustees and managers of the Vermont Central Railroad Company and the Ogdensburg and Lake Champlain Railroad Company:

And whereas the Concord Railroad Corporation is not now ready to execute said contract, and the parties hereto believe it for their interest that the same should immediately go into effect whether executed by said Concord Railroad Company or not:

Therefore we covenant and agree each with each other and all of the others, that said contract may be delivered without being executed by said Concord Railroad Corporation, and that when so delivered it shall be of full force and effect, and obligatory upon each and all of us from this date; but this shall not prevent the execution of said contract by said Concord Railroad Corporation at any time hereafter.

In witness whereof the said corporations have caused their corporate seals to be hereto affixed, and these presents to be signed, and the trustees and managers of the Vermont Central Railroad Company have hereto set their hands and seals this twenty-fourth day of February, A. D. eighteen hundred and seventy.

VERMONT & CANADA RAILROAD,
(Signed) By JOHN PORTER, *Vice-President.*

TRUSTEES AND MANAGERS V. C. R. R.
AND VERMONT AND CANADA RAILROAD,
(Signed) J. GREGORY SMITH.
(Signed) B. P. CHENEY.
(Signed) L. BRAINARD.
(Signed) JOSEPH CLARK.

168 THE BOSTON & LOWELL R. R. CORPORATION,
By its committee—
(Signed) F. B. CROWNINSHIELD,
(Signed) J. G. ABBOTT,
(Signed) GEO. STARK, Manager, *Committee.*

THE NASHUA & LOWELL R. R. CORPORATION,
By its committee—
(Signed) F. B. CROWNINSHIELD,
(Signed) GEO. STARK, Manager,
(Signed) J. G. ABBOTT, *Committee.*

NORTHERN R. R. CORPORATION,
By its committee—
(Signed) ONSLOW STEARNS.
(Signed) URIEL CROCKER.

Evidence for Complainant.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States in equity, as amended, before me—

FISHER AMES,
U. S. Commissioner.

Deposition of Josiah G. Abbott.

Direct examination by SIDNEY BARTLETT, Esq., of counsel for complainant:

BOSTON, *April* 11, 1883.

Int. 1. What is your name, residence, and occupation?

Ans. Josiah G. Abbott; residence, Boston; occupation, lawyer. I am the president of the Boston and Lowell railroad. I was a director in that road before 1870, and have been so ever since.

Int. 2. Assuming the contract marked "A," annexed to the plaintiff's bill, to be a true copy of the original, state whether or
169 not the same was executed by you and others as a committee of the Nashua and Lowell Railroad Company; and, if so, by what authority?

Ans. I executed the contract with the other two members of the committee, Mr. F. B. Crowninshield and Mr. Geo. Stark, on or about the date it bears. We executed it by virtue of the authority given by a vote of the board of directors of the Nashua and Lowell Railroad Company, a copy of which I have and now produce to be annexed.

(Paper produced marked "Exhibit 1, Abbott, F. Ames, U. S. commissioner, April 11, 1883.")

Int. 3. Will you look at the printed copy of the contract bearing date Feb. 24, 1870, between the trustees of the managers of the Vermont Central Railroad Company of the first part, and the Northern railroad of New Hampshire and other railroad corporations of the second part, and say whether that contract was executed by you, Mr. Crowninshield, and Mr. Stark, as a committee of the Nashua and Lowell Railroad Company; and if so, by what authority?

(Copy annexed, marked "Exhibit 2, Abbott, F. Ames, U. S. commissioner, April 11, 1883.")

Ans. Yes; I executed that instrument with the other two members of the committee in behalf the Nashua and Lowell Railroad Company, and I supposed we were acting under authority of a vote of the directors, a copy of which I produce to be annexed.

(Paper annexed, marked "Exhibit 3, Abbot, F. Ames, U. S. commissioner, April 11, 1883.")

I say I suppose—I have no doubt about it.

Int. 4. Will you look at what purports to be a modification of the contract A, annexed to plaintiff's bill, already referred to, and to be signed by you and Messrs. Stark and Crowninshield, as a committee,

and state whether the same was executed by you and the other members of the committee; and if so, by what authority?

(Paper annexed, marked "Exhibit 4, Abbot, F. Ames, U. S. commissioner, April 11, 1883.")

Ans. We did execute it, and by virtue of the same vote of the board of directors which I have referred to before and annexed as Exhibit 1.

170 (It is agreed by counsel that the documents produced, Exhibits 2 and 4, and that Exhibit A, annexed to the plaintiff's bill, are true copies of the originals respectively, and may be used instead of the originals.)

Int. 5. State whether or not the provisions of the contracts, referred to in your previous answers were, with the knowledge and assent of the directors of the Nashua and Lowell Railroad Company, carried out until the failure of the Transportation Company in 1874; or were they varied, abandoned, or modified in any way, so far as you know?

(Objected to.)

Ans. The provisions of those contracts were very fully discussed by the directors of the Nashua and Lowell Railroad Company, previous to being signed, and I have no doubt were fully known to every member of the board, and were fully assented to by every member of the board before and after their execution; and as far as I know they were executed on all sides until about the time of the failure of the Northern Transportation Company. I had nothing to do with the direct management of the corporations or either of the parties to the agreement; all that I know comes from those who had the direct control and management of the affairs of the Boston and Lowell and Nashua and Lowell Railroad Companies.

Cross-examination by F. A. Brooks, Esq., of counsel for the Nashua and Lowell Railroad Company:

Cross-int. 6. Is not your knowledge as to the views and information possessed by the directors of the Nashua and Lowell Railroad Corporation derived from your presence at the meetings of the directors of that company, at which meetings were also present the directors of the Boston and Lowell railroad. Were you a director at any time of the Nashua and Lowell Railroad Corporation?

Ans. My knowledge of the views of the directors of the Nashua and Lowell Railroad Corporation was derived mainly from the discussions of these contracts when the directors of the Boston and Lowell Railroad Corporation held meetings with the directors of the Nashua and Lowell Railroad Corporation. I did discuss those contracts with some members of the board of directors of the
171 Nashua and Lowell railroad, not at these meetings. I never was a director of the Nashua and Lowell Railroad Corporation.

Cross-int. 7. Was not the meeting of Feb. 6, 1871, a joint meeting of both boards of directors?

Ans. I haven't the slightest recollection as to the meeting of Feb. 6, 1871. I have no doubt, from the tenor of the record which has been handed me, and which has been put in here, that the directors of the Boston and Lowell Railroad Company held a joint meeting on that occasion with the directors of the Lowell and Nashua Railroad Company, but I have no manner of recollection of it whatever.

Cross-int. 8. Were these joint meetings presided over by F. B. Crowninsfield, who was president and director of both these corporations in February, 1871?

Ans. Whether the meeting of Feb. 6, 1871, was presided over by Mr. Crowninshield I have no knowledge or recollection. Ordinarily the meeting of the two boards were presided over by Mr. Crowninshield, who was the president of and a director in each of the two corporations.

Cross-int. 9. Were not measures proposed at these joint meetings acted upon by members of both boards on votes submitted to them at one and the same time on which they voted in common; that is, without discrimination in regard to the corporation in which they were directors?

Ans. I should say as to matters in reference to the joint management of the two roads under the contract which existed between them, votes were proposed and submitted to the directors of the two corporations sitting together without discrimination between the members of the two corporations; but my recollection would be that in all matters that required a separate action of each board, and in reference to matters not covered by the contract between them, that care was taken upon all such questions to ascertain the vote of each board of directors, although they set together in one place in one session, there being a clerk of each board present, I think, always—usually present, at any rate.

Cross-int. 10. On the occasion of the vote of Feb. 6, 1871, Exhibit 1, was not the action taken joint and not several?

172 Ans. I have no recollection whether I was present on that occasion, and, as I have said before, I haven't the slightest recollection of that vote or of the meeting at which it was passed.

Cross-int. 11. Please look at the vote and state whether, if you were present and participated in the passing of that vote, you understood the action so taken to have been the joint action of the directors of both corporations sitting in one body, and not the several action of either board.

(Objected to, for substance.)

Ans. Not recollecting whether I was present or not, I can't say what I understood upon the supposition that I was present; but when I signed the contract and now I believe I was acting under the vote of the directors of the Nashua and Lowell Railroad Company, without any reference to the fact that the directors of the Boston and Lowell Railroad Company passed a vote to the same effect at the same time.

Cross-int. 12. Do you mean by your last answer to suggest that the Nashua and Lowell directors passed any other vote on this subject

Feb. 6, 1871, than the one which was submitted to them and to the directors of the Boston and Lowell Company simultaneously as a proposition to be passed upon by the common vote of the directors of both corporations sitting and acting together as if they were one body and not two separate boards of directors?

(Objected to, as assuming a fact not heretofore stated by the witness and not shown.)

Ans. I haven't the slightest knowledge or recollection how the vote was submitted to the board of directors of the Nashua and Lowell Railroad Company. Whether in the manner suggested in the question or not I have no recollection or knowledge.

Cross-int. 13. Is there anything in your recollection, or in the copy of the vote itself, which leads you to believe that separate action was taken by the Nashua and Lowell directors on the vote of Feb. 6, 1871?

Ans. I have said I have no recollection about it. I believed then, at the time I executed the contract, and I believe now, that the directors of the Nashua and Lowell Railroad Company passed that vote, but whether they were present at a joint meeting with the
173 directors of the Boston and Lowell Railroad Company at the time I have no recollection or knowledge.

Cross-int. 14. If the record of this meeting contained in Exhibit 1 is correct in stating that the directors of the Boston and Lowell Company were present in joint session with the Nashua and Lowell directors, do you not understand that the action reported as taken at such meeting was a joint action and not separate?

(Objected to, as asking the understanding of the witness of a matter of which he has stated he has no knowledge.)

Ans. I do not so understand. From my knowledge of the general course of business of the two corporations when they met together in joint session, I believe this vote to be the separate action of the directors of the Nashua and Lowell Company, and if there was a vote to the same effect of the directors of the Boston and Lowell Company that such vote was the separate vote of that board, and that means were taken at the time the vote was taken to ascertain the vote of the board of directors of each corporation.

Cross-int. 15. If correct in the understanding just expressed by you, how do you account for the use of the words "our interests" which occur near the end of that vote? If the vote was submitted to the Nashua and Lowell Railroad Company directors and passed by them separately, should not the word used be singular and not plural?

Ans. I have no doubt the vote was drawn up somewhat hastily. I have no doubt but that both boards of directors considered the matter of interest and importance to both the corporations, from the fact that the profits or losses from the contract were to be shared in certain proportions under the contract between them, and, therefore, no doubt it would be natural to use the word "our" interests.

Cross-int. 16. Does not the language of the vote making a com-

mittee in behalf of "these corporations" lead you to believe that the committee was a joint one and not a committee of each corporation separately?

Ans. It does not. I should suppose a like vote was passed at the same time by the directors of the Boston and Lowell corporation, and, from my knowledge of the general course of business at the meetings of the two corporations, that means were taken to
174 ascertain the vote of the directors of each corporation upon that matter.

Cross-int. 17. It is true, is it not, that only one of the three members of this committee, Mr. Crowninshield, was a director in the Nashua and Lowell Railroad Company?

Ans. I suppose it to be; it isn't within my personal knowledge.

Cross-int. 18. If the vote of Feb. 6, 1871, for constituting this committee, two of whom were not directors in the Nashua and Lowell Company, were the separate vote of that company, would such committee, in your judgment, be authorized to bind the Nashua and Lowell Railroad Corporation by their action?

Ans. It would.

Cross-int. 19. It is not, then, in your judgment, necessary that a committee appointed by directors, or a majority of them, should be members of the board of directors making the appointment?

Ans. Not necessary for the purpose for which this committee was appointed.

Cross-int. 20. Contemporaneously with the negotiation expressed in contract A, annexed to plaintiff's bill, was not a contract also made between Smith and Stark, trustees, etc., and Philo Chamberlin, of Cleveland, Ohio, being the same annexed to defendants' answer in this case as Exhibit B?

(Objected to, as immaterial and incompetent.)

Ans. I have no doubt such a contract was made, but I have no especial recollection in reference to it. I have a general recollection about a contract being made, but no particular recollection as to it.

(It is agreed on the part of the plaintiff that if the contract, Exhibit B, referred to is competent and material in the case, which is denied, such contract was executed, and the copy in the defendant's answer may be used as the original.)

Cross-int. 21. In that contract, Exhibit B, I find Smith and Stark described as the executive committee for the management of the Ogdensburg and Lake Champlain railroad in behalf of railroads extending from Rouse's Point to Boston, etc., known as the Vermont Central Line, contracting for and in behalf of, and as trustees for said line. Are they the same Smith and Stark who are named as parties of the second part in contract A, annexed to the plaintiff's bill?

175 Ans. I have no doubt they are. I know of no other persons who answer the description of those parties in both those contracts.

Cross-int. 22. Was it not understood at and before those contracts, Exhibits A and B, that Chamberlin was the holder of much the larger part of the capital stock of the Northern Transportation Company, and that the control of that company must be obtained, if at all, by the purchase of his shares of said capital stock?

(Objected to, as impertinent and immaterial, and asking for the understanding of some one, who it does not appear.)

Ans. The details and circumstances of the negotiations at the time of the execution of the contract A—I believe that is the one executed—are not very fresh or clear in my recollection. I know generally it was understood that a Mr. Chamberlin—I don't recollect his Christian name—from somewhere in the West, I don't know where, had the general control and power over the affairs of the Northern Transportation Company, and that he was the person to be negotiated with to obtain the control of that company.

Cross-int. 23. Do you recollect, as a matter of fact, that papers were drawn for acquiring his interest in the Northern Transportation Company?

(Objected to, on the grounds already stated.)

Ans. I do not recollect it as a matter of recollection. I have no doubt from my general knowledge of the whole subject-matter that his interest was acquired, and I suppose by that contract B, although I have no recollection as to the contract.

(Latter part of the answer objected to by plaintiff.)

Cross-int. 24. According to your best recollection, do not these two contracts, A and B, constitute parts of one and the same general transaction?

Ans. I recollect, as a matter of recollection, contract A; I do not, as a matter of recollection, as I have said before, recollect the contract B, although from my general knowledge of the course of business I have no doubt it was executed at or about the time contract A was executed. As to the two contracts being parts of one and the same transaction, I do not think they were; but I do think from my knowledge of the whole matter that unless the interest of Chamberlin had been obtained, either by contract B or some other
176 contract, the parties to contract A would not have been in a condition to have entered into any such arrangement.

Adjourned.

APRIL 12, 1883.

Cross-examination by J. H. BENTON, Jr., Esq., of counsel for the Boston and Lowell Railroad Company (taken in short-hand by agreement of counsel):

Cross-int. 25. At the time the contract marked "A," annexed to plaintiff's bill, was made, what was your connection with and knowledge of the affairs and credit of the Boston and Lowell, Nashua and Lowell, and Northern railroads?

Ans. I was director of the Boston and Lowell railroad, and had

been for many years; the Nashua and Lowell railroad had a business contract with the Boston and Lowell railroad by which the two roads were operated under one management, and had been for some years. I was well acquainted with the standing, credit, and business capabilities generally of the Northern railroad. I knew the officers of the road, and was in frequent communication with them. The credit of each of the three roads was as good as that of any corporations as far as I know in New England. I don't think any of them ever paid for any lease more than seven per cent., which was the ordinary interest and rate at that time, I think, or about that time, for railroad bonds.

(Answer objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Cross-int. 26. Whether or not either of those corporations, from your knowledge of their condition, situation, and credit, could have borrowed money on their bonds or notes for fifteen or twenty years, to run at from six to seven per cent., at the time this contract was made?

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Ans. I have not the slightest doubt but they could have made such loans on credit.

Cross-int. 27. Did you take part in the negotiations with the Ogdensburg road with reference to making contract annexed to the plaintiff's bill, called Northern Transportation Company contract?

177 Ans. I did. I acted as one of the commiteee on behalf of the Boston and Lowell railroad, and one of the committee on behalf of the Nashua and Lowell railroad, and took part in all the negotiations in reference to the making of that contract.

Cross-int. 28. Whom did you meet on behalf of the Ogdensburg road?

Ans. I met, I am very sure, Mr. Pratt, who, I think, was the president of the road at that time, and I met some others on behalf of the Ogdensburg road whose names I cannot now give, and had quite frequent communications with them.

Cross-int. 29. Did or did not the persons who met you in this matter on behalf of the Ogdensburg road express to you at that time any fear with reference to the loss of the connection between the Northern Transportation Company and the Ogdensburg road by a change of the boats to Montreal. If anything was said upon that subject or came to your knowledge from the parties representing the Ogdensburg road at that time, state what it was?

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Ans. The persons with whom I negotiated with others on behalf of the Ogdensburg road—certainly Mr. Pratt, I am quite sure of him—did speak of the great desirability of retaining the traffic com-

ing from the boats of the Northern Transportation Company for the credit of the Ogdensburg railroad. In the course of the negotiation, and in reference to it, it was stated and claimed by myself and others with me that the Ogdensburg railroad might well afford to pay the whole amount of $600,000 rather than to lose the connection with the boats of the Northern Transportation Company. It was always admitted by those that I met that retaining the traffic of the Northern Transportation Company would be of great benefit and consequence by the Ogdensburg road, but I can't say whether they admitted the benefit would be fully equal to the $600,000 or not.

(Answer objected to, as containing matter wholly immaterial and inadmissible.)

Cross-int. 30. Did they or not say to you that they feared the connection would be broken unless the Northern Transportation Company contract was made?

178 (Objected to, as not in regard to any subject-matter of the direct examination, and as being immaterial to the issue.)

Ans. That was understood by all the parties to the negotiation, both those representing the Ogdensburg railroad and those representing the other roads, and it certainly was, as I understood it, the controlling reason with those representing the Ogdensburg, as well as those representing the other roads, that the connection would be broken with the Northern Transportation Company boats.

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Cross-int. 31. Do you know whether at that time the Ogdensburg road had any other connection for Western business than its connection with the Northern Transportation Company boats at Ogdensburg?

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Ans. I supposed that the main connection was by the boats of the Northern Transportation Company from the Lakes; I can't say that that was the only connection. My impression is that there was a ferry boat or boat running across the St. Lawrence and connecting with the Grand Trunk in some way or other in addition to the Northern Transportation Company—an impression that I am not sure of.

Cross-int. 32. Do you know what proportion of the business of the Ogdensburg road came from its connection with the Northern Transportation Company boats?

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Ans. I cannot tell you any exact proportion, but I understood at the time, and do now, that a very large proportion of their receipts of business came from this connection with the Northern Transportation Company boats.

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Cross-int. 33. Whether or not you had that understanding from the parties representing the Ogdensburg road in this negotiation?

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

179 Ans. I had that understanding then, and had it before. There was never any question about the fact that a very large proportion of the receipts came from that business.

(Objected to, as not in regard to any subject-matter of direct examination, and as being immaterial to the issue.)

Direct examination resumed:

Int. 34. You say there was an agreement between the Boston and Lowell and Nashua and Lowell railroads. Was it in writing?

Ans. It was in writing.

J. G. ABBOTT.

Attest: FISHER AMES,
U. S. Commissioner.

EXHIBIT 1.—ABBOTT F. AMES, *U. S Commissioner, April* 11, 1883.

Extract from Records of Directors of the Nashua & Lowell Railroad Corporation.

Copy.

BOSTON, *Feb.* 6, 1871.

At a meeting of the directors of the Nashua & Lowell Railroad Co. held at No. 65 Washington St., Boston, on Monday, the 6th day of February, 1871, Messrs. Crowninshield, Spalding, Stearns, and Sigourney were present.

The directors of the Boston & Lowell Railroad Co. were present in joint session.

* * * * * * *

The manager reported the condition of negotiations between the Vermont Central Line and the Ogdensburgh & Lake Champlain Railroad Co. and the Northern Transportation Co. with reference to obtaining for the benefit of the line the control of the boats and other property of said Transportation Co., and securing their more efficient and permanent operation upon the Western lakes, and it was—

Voted, That Mr. Crowninshield, of this board; Judge Abbott, of the Boston and Lowell board, and the manager be a committee on behalf of these corporations, with power to execute such contracts in connection with other roads in the line and with the Ogdens-

180 burgh & Lake Champlain Railroad Company, the Northern Transportation Co., and the trustees who may hold the property of said last-named company, as may in their judgment tend to promote our interests by retaining and fostering the business of the

Western lakes in connection with Boston and other New England points.

The meeting was then adjourned.

Attest: GEO. STARK, *Clerk.*

EXHIBIT 2 ABBOTT.—F. AMES, *U. S. Commissioner, April* 11, 1883.

Contract for Business of the Vermont Central Railroad in Connection with the Northern, Concord, Nashua & Lowell and Boston & Lowell Railroads, 1870.

This memorandum of an agreement, entered into the twenty-fourth day of February, in the year 1870, between the trustees and managers of the Vermont Central Railroad, party of the first part, the Northern Railroad of New Hampshire, party of the second part, the Concord Railroad Corporation, party of the third part, and the Nashua and Lowell and Boston and Lowell Railroad Corporations, parties of the fourth part—

Witnesseth: That whereas the respective parties own, operate, or control the several parts of a continuous line of railroads extending between Boston, in the State of Massachusetts, and the Province Line, in the State of Vermont, with sundry roads and branches connecting therewith; and whereas it is for the best interest of all concerned that so much of the transportation business over said roads as is common between the said first party and the said other parties severally should be managed in such manner as to secure efficiency, economy, and public convenience:

Now, therefore, for the accomplishment of these purposes, and for the purpose of maintaining between themselves relations which shall prevent conflicts of interest between any of their respective
181 roads and branches, it has been and is hereby mutually agreed between the parties as follows:

Article I.

This agreement is made for the purpose of facilitating between such of the parties hereto as may be concerned therein the business included in this agreement, and the adjustment and settlement of all matters arising therefrom; and each of the said parties does hereby agree only for itself, and so far as its own roads may be concerned; and nothing herein contained is to be construed as in any way creating or authorizing any copartnership between the parties, or any obligation or liability at any time, on the part of one party, for any business to be done on the line of any other party, or for any acts or defaults of any other party hereto; but each party is to be answerable only for its own roads and its own acts and defaults, except as hereinafter specifically provided for settlements between themselves.

Article II.

The business contemplated in this agreement is the transportation of persons and property between Boston at the east, and Rouse's Point and the Province Line, in Vermont, at the west and north, and

all points intermediate and beyond these points, respectively, which are accessible to the general line hereby formed, including also the business on and over the road from Lowell to Salem, and the road from the Province Line to St. John's, so far as either of the same are controlled by any of the parties hereto.

Article III.

For the better and more harmonious conduct of said business, it shall be entrusted to the immediate control of a board of six directors, of whom three shall be chosen by the first party, and one by each of the other parties, at such times as they may think proper; and a majority of said directors, present at any meeting, shall govern in all matters included in this agreement. Said directors, in the management of said business under this agreement, shall be regarded and act as the agents of each of the parties, respectively, so far as
182 the transportation of said business over its own roads, as aforesaid, may be concerned, but not otherwise.

Said board shall choose a chairman from their number, who shall act as general manager of the line in all matters covered by this agreement, under the advice and direction of the board.

Article IV.

Each party hereto is to furnish for the joint passenger business aforesaid, over its own roads, suitable passenger and baggage cars, properly manned with conductors and all necessary servants, and warmed, lighted, lubricated, cleaned, and otherwise made attractive to travellers.

And the risks of transportation upon said joint passengers and servants and cars or property in and upon said passenger trains shall be assumed by the said parties, respectively, on their own roads, and not elsewhere. Either of the contracting parties may, by mutual agreement, furnish cars to run beyond its own road, in which case it shall be allowed by the party or parties on whose road it furnishes cars, for the use and car risk thereof, one-fourth of a cent for each joint passenger per mile hauled therein; and for emigrant passengers a sum less in the same proportion as the emigrant price of passage is less than the first-class.

Article V.

When it is deemed expedient that baggage masters should go through between Boston and stations on the said roads of the first party, for the purpose of taking charge of the baggage and cars, the expense shall be borne by the several parties, in proportion to the length of their roads over which such baggage masters may pass.

Article VI.

The party of the first part shall furnish and maintain in good running order a sufficient number of substantial freight cars, suitable for the convenient carriage of all the merchandise offered for

transportation between through points named on the joint tariff; but the other parties may, by mutual agreement, furnish
183 merchandise cars for such joint business to an extent not exceeding their proportion in the division of joint merchandise receipts.

In compensation for the use and maintenance of such cars for joint merchandise, the party furnishing the same shall be allowed and paid out of the gross joint receipts the sum of two-fifths of one cent per ton per mile for each ton of joint merchandise hauled therein, and a like sum per ton per mile on each ton of freight carried between one local point and another on any road other than the road or the party furnishing the car, or between any points on the line, off of the road or roads of the party owning the cars; the tonnage to be reckoned according to the specifications of tariffs annexed.

Cars belonging to any road in the line shall not be sent beyond the limit covered by joint tariff, or connecting roads or branches operated by any of these parties, except by payment of the regular rate of service, and the sum of two dollars per day for each car until returned to the place where it left the line. Nor shall such cars be used for any business going from one point to another in the line unless going over a portion of the road owning them, except in some instances, a car may be loaded for some point in the line, in the direction of the road to which the car belongs, when it can be done without any great detention to the car.

Article VII.

The joint tariffs on passengers and freight being established by the first party, and copies appended hereto, shall not be changed during the continuance of this agreement, in such manner as to diminish the aggregate or comparative receipts of the other parties therefrom, without their respective consent.

Article VIII.

Except as hereinafter otherwise specially provided, all damages to any freight car while in use for any business included in this agreement shall be repaired or paid by the party owning the same; and all losses or damage to freight therein shall be paid by the parties over whose line the same is for transportation, in the proportion of their respective interests in the division of the receipts on
184 the way-bills of the goods to which said losses or damage happens, as hereinafter provided.

Each party may examine the cars of each other party when they come on their line, and, if deemed unsafe, may repair them at the expense of the owners, or may reject them from the line, giving immediate notice to the owners, whose duty it will be to remove such cars, and supply others in their place.

The liabilities of the parties who load the cars shall include and cover all damage or loss of goods from the time the same are received at the depots until they are loaded in the cars, and delivered

in the train ready to start, as well as all liability or damage incurred from improper loading, stowage, or misdirection of freight; and the liability of parties unloading is to include and cover all damage or loss caused or suffered after the cars arrive at the station to which they are destined.

In selecting cars for the loading of freight, preference shall be given to the cars of the road having its whole length, or the greatest proportionate length in the line over which such freight is to be transported.

Article IX.

A depot charge shall be allowed and paid out of the joint receipts, as compensation for rents of grounds and buildings, for loading and unloading freight, for booking and billing, and for collecting and accounting for moneys made there payable, and for risks about the depot; which said charge is to be paid to and received by the party at whose station the said facilities are furnished. Such charge is to be based on the unit of a ton as defined in the tariffs hereto annexed; and shall be thirty cents per ton at Boston, and East Cambridge, and Burlington, and twenty cents per ton at all other stations.

Article X.

A charge of twenty cents per tariff ton shall be allowed the first party, and paid out of the proportion of the second, third and fourth parties, and the proportion of the Ogdensburg and Lake Champlain railroad, on all freights received at Ogdensburg, by water, or from the Grand Trunk or other Canadian railroad
185 at Prescott, including flour and meal manufactured at Ogdensburg from grain received there as above, and transported over the roads of the first party to any point on or beyond the roads of the other parties, as provided in this agreement.

Article XI.

Each party shall collect all bills for joint freight business that may be due at stations on its roads, and furnish and sell joint tickets to passengers at such stations as the through management shall direct, and shall be answerable to the other parties for the proportions of such collections and sales, to which they are severally entitled.

Article XII.

The receipts from the joint passenger and freight business due under this agreement shall be apportioned between the parties hereto as follows:

The gross receipts from joint passengers are to be divided between the parties in the proportions of the distances transported over each party's road, except when the tariff is made up by adding local rates, in which case no road shall receive for its proportion more than its local tariff rate. And from the proportion of each road thus ascertained there shall be deducted and paid over to the party furnishing

the cars the amount of car and risk service earned under the provisions of Article No. 4. There shall also be deducted from the remaining proportions of the second, third, and fourth parties ten per cent. of their said remainder, and paid to the party of the first part.

The gross receipts from joint freight are to be thus divided:

From the whole amount received there is to be deducted terminal charges as referred to in Article No. 9, and car service as referred to in Article No. 6. The remainder to be divided between the parties respectively in proporion to their length of road on which said freight is transported, except that in no case shall any road in division receive more than its local tariff rate. From the proportion thus ascertained of the second, third, and fourth parties, including their depot charges, ten per cent. is to be deducted and paid over to the first party.

186 And for certain freight from Ogdensburg a further payment is to be made to the first party as defined in Article No. 10.

Article XIII.

It shall be the duty of each of the parties hereto to exercise all due diligence in loading, unloading, and returning the cars of the other parties when consigned to points on their respective roads.

An agent shall be employed by the party of the first part to look after the cars in the line, to guard against unnecessary or unreasonable detentions, and the proportionate expense of such agency shall be borne by the parties hereto in the proportions of their respective interest in the joint haulage. And the said agent shall conform to such rules and regulations as shall be established from time to time by the board of directors hereby constituted.

Article XIV.

It is the intent of the parties to this agreement to secure to the connecting and continuous line of railroad above mentioned, all the business requiring transportation between points thereon, or which may be conveniently reached thereby. And the parties hereto mutually agree that they will not do, nor so far as they can control the same, with a just regard to the public convenience, suffer to be done any act or thing which shall in any way contravene the letter or spirit of this agreement, and that they will, respectively, so far as they properly may, in all respects, manage and direct said business, on their several roads, so as to secure to the others the traffic as hereby intended.

Nothing, however, in this agreement contained shall be construed to prevent the party of the first part from maintaining its present relations with other connecting roads: Provided, That not exceeding the proportionate amount, nor in any one year the aggregate amount in quantity or tariff value of business which in the year 1866 passed over the Cheshire railroad, from stations on the roads of the first party, may be continued to said Cheshire railroad without violation

of this contract. Provided, also, That the through rates by said Cheshire railroad shall not be less, nor the local proportions
187 of the first party more, per mile of their road used than upon business by the line hereby formed.

And it if further agreed that in the fair discharge of the obligations assumed by the party of the first part, to promote the interests of the line formed by this agreement, it shall be the duty of the said party of the first part to protect the said parties of the second, third, and fourth part, by all proper measures, from any undue or improper means of any other connecting road, to influence freights or passengers from the line hereby formed; whether said influence is used in the way of offering lower rates, paying drawbacks, giving free passes and the like, or any other improper and unfair means.

And the said party of the first part shall, if requested by either of the other parties hereto, make annual returns to said other parties of the whole amount in quantity and tariff value of the business contemplated in this agreement which has been done by way of the Cheshire railroad, as provided in this article or otherwise.

Article XV.

This agreement shall continue and be in force between the parties for and during the term of twenty years from March 1, 1870: Provided, however, That if for any cause there shall be a failure in the performance of a certain contract this day entered into by and between the Sullivan County railroad of the one part, and J. Gregory Smith, of St. Albans, Vermont, of the second part, by reason of which said Smith shall, without any intentional default on his part, be deprived of the use of said Sullivan County railroad, as provided in said contract, and the Vermont Central railroad be thereby deprived of a connection with said Sullivan County railroad with the railroads connecting with said Sullivan railroad at Bellow's Falls, then the party of the first part may terminate this agreement by giving thirty days' notice thereof, in writing, to the parties of the second, third, and fourth part.

In witness whereof, the respective parties have hereunto subscribed and affixed the seals of said corporations, the day and year first above written.

188 THE TRUSTEES AND MANAGERS OF THE CENTRAL & VT. & CANADA RILROADS,
(Sig.) By J. GREGORY SMITH.

In presence of—
GEO. E. TODD.

[L. S.] THE NORTHERN RAILROAD,
By their committee duly authorized—
(Sig.) ONSLOW STEARNS.
" URIEL CROCKER.

THE CONCORD RAILROAD CORPORATION,
(Sig.) By J. MINOT, *Pes't.*
GEO. E. TODD.

[L. S.] THE BOSTON & LOWELL RAILROAD CORPORATION,

By its committee—

(Sig.) J. G. ABBOTT,
F. B. CROWNINSHIELD,
GEO. STARK, *Manager*,
Com.

L. R. KIDDER.

[L. S.] THE NASHUA & LOWELL RAILROAD CORPORATION,

By its committee—

(Sig.) F. B. CROWNINSHIELD,
GEO. STARK, *Manager*,
J. G. ABBOTT,
Com.

L. R. KIDDER.

EXHIBIT 3, ABBOTT.—F. AMES, *U. S. Commissioner, April* 11, 1883.

Vote passed by directors of Nashua & Lowell R. R., Feb. 14, 1870.

Voted—That Messrs. Crowninshield, Abbott, and the manager be a committee with power to negotiate and conclude a contract in connection with other railroad companies, between Boston and Rouse's Point for the traffic of the Ogdensburg and Lake Champlain R. R.

(Signed) GEO. STARK, *Clerk.*

189 EXHIBIT 4, ABBOTT.—F. AMES, *U. S. Commissioner, April* 11, 1883.

This agreement between the trustees and managers of the Vermont Central and the Vermont & Canada Railroad Companies, the Northern railroad of New Hampshire, The Nashua & Lowell Railroad Corporation of New Hampshire and Massachusetts, and the Boston and Lowell Railroad Corporation of Massachusetts, witnesseth:

Whereas the said parties, as the parties of the third part, have contemporaneously with the execution hereof, entered into an agreement bearing date Feb'y 24th, 1871, relative to the Northern Transportation Company and for other purposes:

Now, for the better understanding and explanation of said contract, the parties hereto have agreed with each other as follows:

First. The provisions of article second in said contract providing for a contribution by said parties of the third part from the gross receipts for the transportation of passengers and freights, shall be held to apply to the whole gross receipts by each of said parties from said passengers and freight, including all depot and bridge charges, car service, and all other charges & allowances whatsoever.

Second. It is further agreed that the sum of 4.50 dollars per ton shall be adopted by the parties as the minimum rate from Ogdens-

burg to Boston for freight from the steamboats of said Northern Transportation Company, and 3.20 dollars per ton as the minimum rate for freight from Boston to Ogdensburg to said steamboats, and that when freight is taken at less than said minimum rates, the deduction from said minimum shall be apportioned *pro rata* upon all the charges for haulage, car service, and ten per cent. allowance, loading and unloading, bridge & depot charges, and all other charges as fixed under the provisions of the line contract for the division among the parties of said minimum rates, said line contract being dated Feb'y 24th, 1870.

In witness whereof, the said parties have executed this agreement, the 29th day of August, A. D. 1871.

W. C. SMITH,
B. B. CHENEY,
For Trustees and Managers Vt. Cent. & Vt. & Can. R. R.

190 NORTHERN RAILROAD,
ONSLOW STEARNS,
CHARLES F. CHOATE,
Committee.

Boston & Lowell & Nashua & Lowell Railroad Corporations by—
F. B. CROWINSHIELD,
GEO. STARK,
J. G. ABBOTT,
Committee.

Evidence for Defendants.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended, before me—
FISHER AMES,
U. S. Commissioner.

Deposition of C. E. A. Bartlett.

BOSTON, *May* 13, 1883.

Direct examination by J. H. BENTON, JR., Esq., of counsel for defendants :

Int. 1. Mr. Bartlett, where do you reside, what is your business?

Ans. In Boston; I am the treasurer of the Boston and Lowell railroad.

Int. 2. How long have you been treasurer of the Boston and Lowell railroad?

Ans. Since 1869.

Int. 3. Did you know of the execution of the contract, dated Feb. 24, 1871, known as the Northern Transportation Company contract, a copy of which is annexed to the plaintiff's bill?

Ans. I did.

Int. 4. Did you or not act as one of the trustees of the sinking fund provided by Article 5 of that contract?

Ans. I did.

Int. 5. Will you state whether at any time, to your knowledge, the persons who acted as trustees of the sinking fund pro-
191 vided for by Article 5 of that contract, fixed any sums which, when paid semi-annually, and invested as a sinking fund, would pay the advances from the party of the fourth part to said contract, agreeably to the provisions of the contract?

Ans. Never, to my knowledge.

Int. 6. Did you act in any way for the parties of the second part to said contract, either in the receipt of money or in payment of money?

Ans. I did.

Int. 7. Did the Ogdensburg road, party of the fourth part to said contract, advance any money to said parties of second part to said contract under the provisions of that contract; if so, what?

Ans. No money, to my knowledge, was advanced. Six hundred eight per cent. bonds of the Ogdensburg road, of the par value of one thousand dollars each, were advanced, and at the same time twenty-four of said bonds, of one thousand dollars each, were returned or delivered to the Ogdensburg railroad.

Int. 8. What was the date of this transaction?

Ans. Oct. 7, 1871.

Int. 9. Did you actually receive six hudred bonds at that time?

Ans. I don't recollect.

Int. 10. Do you recollect whether you ever received the twenty-four bonds which you say were returned to the Ogdensburg road? What I want is to know whether those twenty-four bonds ever actually came into your possession, or whether the transaction was simply on paper.

Ans. I don't recollect.

Int. 11. Was there or not at that time any receipt or voucher given you relating to said twenty-four bonds? If so, please produce the same, and annex a copy of it to this deposition.

Ans. There was a voucher, which I produce. A copy of it I produce to be annexed to this deposition.

(Paper produced, marked "Exhibit A, F. Ames, U. S. Commissioner," and annexed.)

Int. 12. You say you acted for the parties of the second part to said contract; state in what way you acted for them and what you did for them.

192 Ans. Received these bonds, as I stated, from the Ogdensburg railroad, and disbursed the proceeds; also made various payments from time to time, on account of the parties of the second part, on their order.

Int. 13. Did you receive money for them as well as pay it?

Ans. Yes, sir.

Int. 14. Referring to the bonds which were received from the Ogdensburg road, state if you know whether the interest on those bonds was paid by the parties of the third part to said contract; and, if so, up to what time.

Ans. It was paid by the parties of the second part up to Sept. 1, 1874.

Int. 15 Do you know from what source the parties of the second part received the money; and, if so, where did the money come from that was used to pay this interest?

Ans. It came from the Boston and Lowell railroad, Nashua and Lowell railroad, Northern railroad, Central Vermont railroad.

Int. 16. Did the trustees of the sinking fund, under article 5 of the Northern Transportation Company contract, receive any money belonging to the Northern Railroad, through the Boston and Lowell railroad, or you, as treasurer of that road; and, if so, how much?

Ans. They did receive $19,971.24. October 27, 1871; March 1, 1872; Sept. 9, 1872; April 14, 1873; Sept. 10, 1873; March 3, 1874; Sept. 12, 1874, were the dates of payment to the sinking fund.

Int. 17. Did the parties of the second part to said Northern Transportation Company contract receive any money under said contract belonging to the Northern railroad, through the Boston and Lowell railroad, or you, as treasurer of that road? If so, state how much money belonging to the Northern railroad was thus paid to the parties of the second part under the provisions of that contract.

Ans. They did receive $82,504.85.

Int. 18. Did the Boston and Lowell railroad pay any money to the trustees of the sinking fund under the provisions of said contract; and, if so, how much?

Ans. They did pay $7,334.31. The dates of payment to the sinking fund are given in answer to the int. 16.

Int. 19. Did the Boston and Lowell railroad pay any
193 money to the parties of the second part to said contract under this provision; and, if so, how much?

Ans. They did pay $30,690.64.

Int. 20. Did the Ogdensburg road make any other advancement or payment under the provisions of the Northern Transportation Company contract, except the five hundred and seventy-six bonds which you received, as you have above stated?

Ans. Not to my knowledge.

Int. 21. At what price did the parties of the second part dispose of said bonds?

Ans. At par.

Int. 22. Do you know whether the trustees of the sinking fund under article 5 of said contract have any property in their hands?

Ans. I suppose they have; I know they should have. At the last meeting of the trustees there was a balance in the hands of Mr. Church, the treasurer of the trustees of the sinking fund, and he never to my knowledge has had any authority to make any disposition of it.

Int. 23. At the time the Northern Transportation Company contract was made, what, if you know, was the financial position and credit of the Boston and Lowell railroad, Nashua and Lowell road, and the Northern road? And at what rate were they able to borrow money?

(Objected to, as immaterial and impertinent to the issue.)

Ans. As far as the Boston and Lowell road and Nashua and Lowell go, what money they borrowed was at the rate not exceeding seven per cent. No doubt but the Northern could borrow on equally favorable terms.

Int. 24. What was the financial position and credit of those roads at that time?

Ans. Well, I should say it was good.

Cross-examination by SIDNEY BARTLETT, Esq., of counsel for complainant:

Cross-int. 25 (Mr. BARTLETT): Did you furnish to the counsel of the Boston and Lowell railroad the accounts and vouchers annexed to their answer?

194 Ans. I don't recollect, but I don't think I did, Mr. Bartlett. I don't remember.

Cross-int. 26. Or any of them?

Ans. I have no recollection of it.

Cross-int. 27. Are there on the files and in the possession of the Boston and Lowell railroad vouchers taken by you for all payments hereinbefore stated to have been made to the sinking fund above mentioned, or to the parties of the second part to the Transportation Company contract? If so, please produce copies of the same.

Ans. The vouchers are all in the hands of the Boston and Lowell railroad for all payments made, and they were vouchers taken by me. I will endeavor to procure copies of them to be annexed to this deposition.

Cross-int. 28. Will you state the aggregate payments made to the sinking fund at the dates hereinbefore stated by you?

Ans. The aggregate payments to the sinking fund were $253,500, made at the dates and in the amounts following:

Oct. 27, 1871	$46,500
March 1, 1872	46,500
Sept. 9, 1872	46,500
April 14, 1873	46,500
Sept. 10, 1873	22,500
March 3, 1874	22,500
Sept. 12, 1874	22,500
	$253,500

(Adjourned.)

Hearing resumed July 7, 1883.

The witness says, in further answer to cross-int. 27:

I state as follows:

I have caused copies to be made of the vouchers taken by me for payments to the trustees of the sinking fund under article 5 of the Northern Transportation Company contract, and they are hereto annexed as Exhibit B. The whole amount so paid was $271,880,

of which $20,096.88 was paid from money of the Northern railroad and its branches in the hands of the Boston and Lowell railroad, and $7,379.79 was paid from money of the Boston and Lowell Railroad. The difference between the sum of $19,971.34,
195 stated by me, in answer to int. 16, as paid from money of the Northern railroad, and the sum of $20,096.88 above stated to have been paid from money of the Northern railroad, is caused by including in the vouchers for payments to the trustees of the sinking fund vouchers for the sum of $2,000 paid to said trustees on account of salary. And the same fact explains the difference between the sum of $7,334.31 stated by me in answer to int. 18 as paid to the trustees of the sinking fund by the Boston and Lowell railroad, and the sum of $7,379.79 above stated as paid by that road to the trustees of the sinking fund.

I have also caused copies to be made of the vouchers taken by me for payments to the Ogdensburg railroad on account of parties of the second part from money of the parties of the third part, as stated in answer to ints. 14 and 15, as interest on the bonds of the Ogdensburg road issued under the Northern Transportation Company contract, and such copies are hereto annexed as Exhibit C. The amount so paid was $122,160, of which $14,638.47 was paid from money of the Northern railroad and its branches in the hands of the Boston and Lowell railroad, and $5,541.89 was paid from money of the Boston and Lowell railroad.

I have also caused copies to be made of the vouchers taken by me for other payments to the parties of the second part to said Northern Transportation Company contract, and they are hereto annexed as Exhibit D. The amount so paid was $566,354.01, of which $67,866.38 was paid from the money of the Northern railroad and its branches in the hands of the Boston and Lowell railroad, and $25,693.13 was paid from money of the Boston and Lowell railroad. The amounts of $82,504.85 paid from money of the Northern railroad, and of $30,690.64 paid by the Boston and Lowell railroad as stated in answer to ints. 17 and 19, are made up of payments shown in Exhibits C and D, as made on account of interest on Ogdensburg and Lake Champlain Railroad Company bonds and payments to or upon the order of Smith and Stark, parties of the second part under the provisions of the Northern Transportation Company contract.

(Papers referred to in above answer produced, marked "Exhibits B, C, and D, F. Ames, U. S. commissioner," respectively, and annexed.)

C. E. A. BARTLETT.

Attest: FISHER AMES, *U. S. Commissioner.*

196 EXHIBIT A.—F. AMES, *U. S. Commissioner.*

BOSTON, *Oct.* 7, 1871.

Received of J. Gregory Smith and George Stark as executive committee of Vt. Cent'l Line twenty-four thousand dollars, being an

allowance of four per cent. premium on an issue of six hundred thousand dollars of Ogd. & Lake Champlain R. R'd sinking fund bonds, dated March 1st, 1871, as per agreement dated March 4th, 1871.

(Signed) THE OGDENSBURGH & LAKE CHAMPLAIN R. R. CO.,
By HENRY A. CHURCH, *Treas'r.*

EXHIBIT B.—F. AMES, *U. S. Commissioner.*

(No. 3474. Feb., 1872, ac.) $46,500.

BOSTON, *March 1st*, 1872.

Received of the manager of the Boston and Lowell Railroad Corporation, forty-six thousand five hundred dollars, being payment due this day to trustees of sinking fund as per contract between the Northern Transportation Co., Vermont Central Line, and Ogdensburg & Lake Champlain R. R'd, bearing date February 24th, 1871.

F. B. CROWINSHIELD,
C. E. A. BARTLETT,
JOHN C. PRATT,
HENRY A. CHURCH,
Trustees of Sinking Fund. $46,500 00

(No. 1534. Aug., 1871, ac.) $46,500.

BOSTON, *September* 9, 1872.

Received of Geo. Stark, manager of the Boston & Lowell R. R. Corp., forty-six thousand five hundred dollars, being amount due September 1st, 1872, as payment to sinking fund under contract between No. Transportation Co. of Ohio, the Vermont Cent. Line, and the Ogdensburg & Lake Champlain R. R'd Co, dated March 1, 1871.

F. B. CROWINSHIELD,
JOHN C. PRATT,
C. E. A. BARTLETT,
HENRY A. CHURCH,
Trustees of Sinking Fund. 46,500 00

197 (No. 2134. Oct., 1871, ac.) $46,500.

BOSTON, *October* 27, 1871.

Received of the manager of the Boston & Lowell Railroad Corporation, forty-six thousand five hundred dollars as payment to trustees of sinking fund under contract dated February 24th, 1871, between Northern Transportation Co. of Ohio, Vermont Central Line & Ogdensburgh & Lake Champlain R. R. Co., to provide for payment of certain sums, as follows:

$100,000. Ogd. & L. C. R. R. bonds, March, 1873.
400,000. No. T. Co. " 1881.
500,000. Ogd. & L. C. R. R. " 1890.

F. B. CROWINSHIELD,
JOHN C. PRATT,
C. E. A. BARTLETT,
HENRY A. CHURCH,
Trustees. 46,500 00

(No. 3700. M'ch, 1873, ac.) $46,500.

BOSTON, *April* 14, 1873.

Received of George Stark, manager of the Boston and Lowell Railroad Corporation, forty-six thousand five hundred dollars, being payments due December 31st, 1872, to sinking fund created under contract between No. Transportation Co., Vermont Central Line, and the Ogdensburgh & Lake Champlain Railroad Co., dated February 24, 1871.

F. B. CROWINSHIELD,
JOHN C. PRATT,
HENRY A. CHURCH,
C. E. A. BARTLETT,
Trustees of Sinking Fund. 46,500 00

(No. 1629. Aug., 1873, ac.) $22,500.

BOSTON, *September* 10, 1873.

Received of Geo. Stark, manager of the Boston and Lowell Railroad Corporation, twenty-two thousand five hundred dollars, being payment due June 30, 1873, to sinking fund created under contract between No. Transportation Co., Vermont Central Line, and the Ogdensburgh and Lake Champlain Railroad Co., dated February 24, 1871.

HENRY A. CHURCH,
Treasurer Trustees of Sinking Fund. 22,500 00

198 (No. 3632. Feb., 1874, ac.) $22,500.

BOSTON, *March* 3, 1874.

Received of Geo. Stark, manager of the Boston, Lowell & Nashua Railroad, twenty-two thousand five hundred dollars, being the payment due December 31, 1873, to sinking fund created under contract between Northern Transportation Co., Vermont Central Line, and the Ogdensburgh & Lake Champlain Railroad Co., dated February 24, 1871.

HENRY A. CHURCH,
Treas'r of Trustees,
By JOHN C. PRATT. 22,500 00

(No. 1,149. Aug., 1874, ac.) $22,500.

BOSTON, *September* 12, 1874.

Received of Geo. Stark, manager of the Boston and Lowell Railroad Corporation, twenty-two thousand five hundred dollars, being payment due August 31, 1874, to sinking fund, created under contract between Northern Transportation Co., Vermont Central Line, and the Ogdensburgh and Lake Champlain Railroad Co., date February 24, 1871.

HENRY A. CHURCH,
Treas'r Trustees Sinking Fund. 22,500 00

$253,500 00

Nor. R. R. pro.----------18,008 42
B. & L. R. R. pro.---------- 6,591 22

(No. 3473. Feb., 1872 ac.) $500.

BOSTON, *March* 1, 1872.

Received of the manager of the Boston & Lowell Railroad Corp. five hundred dollars for services for one year to date as trustee of sinking fund under contract dated February 24, 1871, between the No. Transportation Co., the Vermont Central Line, & Ogd. & Lake Champlain R. R. Co.

F. B. CROWNINSHIELD.

$500.

Received of the manager of the Boston and Lowell Railroad Corporation five hundred dollars for services for one year to date as trustee of sinking fund under contract dated February 24, 1871, between the No. Transportation Co., the Vermont Central Line, & Ogd. & Lake Champlain R. R. Co.

199

JOHN C. PRATT.

$500.

Received of the manager of the Boston and Lowell Railroad Corporation five hundred dollars for services for one year to date as trustee of sinking fund under contract dated February 24, 1871, between the No. Transportation Co., the Vermont Central Line, & Ogd. & Lake Champlain R. R. Co.

HENRY A. CHURCH.

$500.

Received of the manager of the Boston & Lowell Railroad Corp. five hundred dollars for services for one year to date as trustee of sinking fund under contract dated February 24th, 1871, between the No. Transportation Co., the Vermont Central Line, & Ogd. & Lake Champlain Railroad Co.

C. E. A. BARTLETT. $2,000 00

Northern R. R., pro.---------- 125 64
Boston & Lowell R. R. pro.---------- 45 48

M'ch, 1872, ac. $930.

BOSTON, *April* 8, 1872.

Received of Geo. Stark, manager of Boston & Lowell R. R. Corp., nine hundred and thirty dollars, being six months' interest to March 1st, at six per cent. on $31,000.00, invested in sinking fund bonds of Ogd. & L. Champlain R. R. Co., said bonds having been canceled, said sum being a part of the payment required to be made to the trustees of the sinking fund under the terms of the contract of March 1st, 1871.

JOHN C. PRATT,
For Himself & Associates, Trustees of Sinking Fund. 930 00

Aug., 1872, ac. $930.

BOSTON, *September* 9, 1872.

Received of Geo. Stark, manager of the Boston & Lowell R. R. Corp., nine hundred and thirty
200 dollars, being six months' interest at six per cent. on thirty-one thousand dollars of canceled Ogdensburg & Lake Champlain R. R. sinking fund bonds purchased by trustee of sinking fund.

F. B. CROWNINSHIELD,
JOHN C. PRATT,
C. E. A. BARTLETT,
HENRY A. CHURCH,
Trustees of Sinking Fund. 930 00

March, 1873, ac. $2,640.

BOSTON, *April* 14, 1873.

Received of Geo. Stark, manager of the Boston and Lowell Railroad Corporation, twenty-six hundred and forty dollars, being six months' interest at 6 per cent. on eighty-eight thousand dollars of Ogdensburgh & Lake Champlain R. R. 8 per cent. sinking fund bonds, the same having been purchased and cancelled by trustees of sinking fund in accordance with contract between Northern Transportation Co., Vermont Central Line, and Ogdensburgh & Lake Champlain railroad, dated February 24, 1871.

F. B. CROWNINSHIELD,
JOHN C. PRATT,
HENRY A. CHURCH,
C. E. A. BARTLETT,
Trustees of Sinking Fund. 2,640 00

Aug., 1873, ac. $3,960.

BOSTON, *Sept.* 10, 1873.

Received of Geo. Stark, manager of the Boston and Lowell Railroad Corporation, thirty-nine hundred and sixty dollars, being six months' interest at 6 per cent. on one hundred and thirty-two thousand dollars of

Ogdensburgh and Lake Champlain R. R. 8 per cent. sinking fund bonds, the same having been purchased and cancelled by trustees of sinking fund in accordance with contract between Northern Transportation Co., Vermont Central Line, and Ogdensburgh and Lake Champlain railroad, dated February 24, 1871.

HENRY A. CHURCH,
Treasurer Trustees of Sinking Fund. 3,960 00

Feb., 1874, ac. $3,960.

BOSTON, *March* 3, 1874.

Received of Geo. Stark, manager of the Boston, Lowell & Nashua railroad, thirty-nine hundred sixty dollars, being six months' interest at 6 per cent. on $132,000 of Ogdensburgh & Lake Champlain railroad 8 per cent. sinking fund bonds, the same having been purchased and cancelled by trustees of sinking fund in accordance with contract between Northern Transportation Co. and Vermont Central Line and Ogdensburgh & Lake Champlain railroad, dated February 24, 1871.

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H. A. CHURCH,
Treas. of Trustees,
By J. C. PRATT. 3,960 00

Aug., 1874, ac. $3,960.

BOSTON, *September* 12, 1874.

Received of Geo. Stark, manager of the Boston and Lowell Railroad Corporation, three thousand nine hundred sixty dollars, being six months' interest, at 6 per cent., on $132,000 of Ogdensburgh and Lake Champlain R. R. 8 per cent. sinking fund bonds, the same having been purchased and cancelled by trustees of sinking fund, in accordance with contract between the Northern Transportation Co., Vermont Central Line, and Ogdensburgh and Lake Champlain R. R., dated February 24, 1871.

HENRY A. CHURCH,
Treas. Trustees Sinking Fund. 3,960 00

$16,380 00

Nor. R. R. pro. 1,960 82
B. & L. R. R. pro. 743 09

EXHIBIT C.—F. AMES, *U. S. Commissioner.*

Feb., 1872, ac. $22,760.

BOSTON, *March* 1, 1872.

Received of the manager of the Boston & Lowell railroad, twenty-two thousand seven hundred & sixty dollars, being six months' interest, due March 1st, 1872,

on outstanding sinking fund bonds, issued by Ogdensburgh & Lake Champlain R. R. Co. under contract between Northern Transportation Co., Vermont Central Line, and Ogd., L. Champlain R. R. Co., dated March 1st, 1871.

OGDENSBURGH & LAKE CHAMPLAIN R.R.,
HENRY A CHURCH, *Treas.*,
Per E. H. CHURCH. 22,760 00

Aug., 1872, ac. $22,760.

BOSTON, *August* 31, 1872.

Received of J. Gregory Smith and George Stark, executive committee of Vermont Central Line, twenty-two thousand seven hundred sixty dollars, in payment for six months' interest to September 1, 1872, on outstanding sinking fund bonds, issued by the Ogdensburg and Lake Champlain Railroad Co., under
202 contract between No. Transportation Co., Vermont Central Line, and Ogdensburgh and Lake Champlain railroad, dated March 1, 1872.

THE OGDENSBURG & LAKE CHAMPLAIN RAILROAD COMPANY,
By HENRY A. CHURCH, *Treas.* 22,760 00

Feb., 1873, ac. $20,480.

BOSTON, *March*, 1873.

Received of Geo. Stark, manager of Boston & Lowell R. R. Corpo., twenty thousand four hundred and eighty dollars, being for six months' interest on $512,000 of Ogdensburgh & Lake Champlain R. R. sinking fund bonds, now outstanding, said bonds issued under contract dated March 1, 1871, between No. Transportation Co., Vermont Central Line, & Ogdensburgh & Lake Champlain R. R'd.

OGDENSBURGH & LAKE CHAMPLAIN RAILROAD CO.,
By HENRY A. CHURCH, *Treas.* 20,480 00

Aug., 1873, ac. $18,720.

BOSTON, *Sept.* 1, 1873.

Received of Geo. Stark, manager of Boston & Lowell Railroad Corporation, eighteen thousand seven hundred & twenty dollars, being six months' interest on sinking fund bonds of Ogdensburg & Lake Champlain R. R'd now outstanding.

OGDENSBURGH & LAKE CHAMPLAIN RAILROAD CO.,
By HENRY A. CHURCH, *Treas.* 18,720 00

Feb., 1874, ac. $18,720.

BOSTON, *February* 28, 1874.

Received of Geo. Stark, manager of the Boston, Lowell & Nashua railroads, eighteen thousand seven hundred twenty dollars, being six months' interest on $468,000 sinking fund bonds of Ogdensburgh & Lake Champlain railroad now outstanding.

OGDENSBURGH & LAKE CHAMPLAIN RAILROAD CO.,
By HENRY A. CHURCH, *Treasurer.* 18,720 00

Aug., 1874, ac. 18,720.

BOSTON, *Sept.*, 1874.

Received of Geo. Stark, manager, eighteen thousand seven hundred & twenty dollars, being six mos. interest, due this day, on $468,000 of Ogd., Lake Champ. R. R. sinking fund bonds now outstanding, as per contract between No. T. Co., V't Cent. Line, & Og. & L. C. R. R., dated February 24, 1871.

HENRY A. CHURCH,
Treasurer O. & L. C. R. R. Co. 18,720 00

$122,160 00

Northern R. R. pro. of above payments.. $14,638 47
Boston & Lowell R. R. " " .. 5,541 89

203 EXHIBIT D.—F. AMES, *U. S. Commissioner.*

(Jan., 1872, ac.) $10,000.

OFFICE OF THE NORTHERN TRANSPORTATION CO. OF OHIO, CLEVELAND, O., *Jan.* 29, 1872.

Pay to the order of J. Colwell, Esq., Cas., ten thousand dollars, for value received, as advised.

E. D. CHILDS, *Sec'ty.*

To C. E. A. BARTLETT, Esq., Tr., Boston, Mass. 10,000

(Jan., 1872, ac.) $39,335.22.

OFFICE OF THE NORTHERN TRANSPORTATION CO., CLEVELAND, O., *Jan. 15th*, 1872.

Received of J. Gregory Smith & Geo. Stark, executive committee of the Vermont Central Line, thirty-nine thousand seven hundred & thirty-five & $\frac{22}{100}$ dollars, on account of the Northern Transportation Company.

E. D. CHILDS, *Sec'ty.* 39,735 22

(Feb., 1873.) $13,000.

OFFICE OF THE NORTHERN TRANSPORTATION CO.
OF OHIO, CLEVELAND, O., *Feb'y 23d*, 1872.

Pay to the order of J. Colwell, Esq., Cas., thirteen thousand dollars, for value received, & chg. ac.

E. D. CHILDS, *Sec'ty.*

To. C. E. A. BARTLETT, Esq., Tr., Boston, Mass.

$7,000. OGDENSBURG, *Feb. 23d*, 1872.

Sight, pay to the order of Jno. D. Judson, Pt., seven thousand dollars, value received, and charge the same to account of N. T. Co.

GEO. A. EDDY, *Ag't.*

To C. E. A. BARTLETT, Treasurer, at office of Boston & Lowell R. R., Boston, Mass. 20,000

(March, 1872, ac.) 1,123 dollars 40 cents.

BOSTON, *March* 11, 1872.

Received of Geo. Stark, manager Boston & Lowell R. R., eleven hundred twenty-three $\frac{40}{100}$ dollars, to pay draft of G. A. Eddy, Supt. for S. S. Sleeper & Co., same am't.

H. B. WILBUR,
Treas'r Northern Transp'n Co.

5,000 dollars. BOSTON, *March* 12, 1872.

Received of Geo. Stark, manager Boston & Lowell R. R., five thousand dollars, to pay E. D. Childs,
204 Sec'y, draft, fav. J. Colwell, Cash'r.

H. B. WILBUR,
Treas'r Northern Transp. Co.

5,000 dollars. BOSTON, *March* 18, 1872.

Received of Gen. Geo. Stark five thousand dollars to be used in paying E. D. Childs, Sec'y, draft on me favor Geo. A. Eddy, Ag't, for same amount.

H. B. WILBUR,
Treas'r North'n Transp'n Co.

5,000 dollars. BOSTON, *March* 19, 1872.

Received of Gen. Geo. Stark, manager, etc., five thousand dollars, to pay draft of Geo. A. Eddy, Ag't No. Trans. Co.

H. B. WILBUR, *Treas.*,
By D. D. RANLETT, *Ass't.*

4,000 dollars. BOSTON, *March* 25, 1872.

Received of Geo. Stark, manager B. & Lowell R. R., four thousand dollars to pay draft of E. D. Childs,

Sec'y N. T. Co., favor J. Colwell, Cash'r, dated March 22, 1871.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 20,123 40

(March, 1872, ac.) 6,000 dollars.

BOSTON, *April 3rd*, 1872.

Received of Geo. Stark, manager B. L. & N. R. R., six thousand dollars to pay draft E. D. Childs. Sec'y, favor J. Colwell, Esq., cashier.

H. B. WILBUR,
Treas'r Northern Transp. Co.

$5,000. BOSTON, 1872.

Received of Geo. Stark, manager B. L. & N. R. R., five thousand dollars to pay d'ft Geo. A. Eddy favor Jno. D. Judson, Pres't.

H. B. WILBUR,
Trs. N. T. Co.

$2,000 dollars. BOSTON, *Apr. 6th*, 1872.

Received of Geo. Stark, Man'r B. & L. & N. & L. R. R., two thousand to pay E. D. Childs, Sec'y, draft fav. Chas. Allison, agent.

H. B. WILBUR,
Treas'r Northern Transp'n Co.

2,000 dollars. BOSTON, *April* 6, 1872.

Received of G. Stark, Man'r B. & L. & N. & L. R. R., two thousand to pay draft of E. D. Childs, Sec'y.

H. B. WILBUR,
Tr's N. T. Co. 15,000

(April, 1872.) 5,000 dollars.

BOSTON, *April* 20, 1872.

Received of Gen. Geo. Stark, Esq., manager, five thousand to pay draft of E. D. Childs, Sec'y, of date April 18, 1872.

H. B. WILBUR, *Treas.*
RANLETT.

2,150.50 dollars. BOSTON, *May* 1, 1872.

Received of Gen. Geo. Stark, manager, twenty-one hundred & fifty $\frac{50}{100}$ dollars to pay draft, April 29, of E. D. Childs, Sec'y.

H. B. WILBUR, *Treas.* R.

205 5,000 dollars. BOSTON, *May* 6, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., five thousand dollars to pay draft of E. D. Childs, sec'y, of May 3d, 1872.

H. B. WILBUR, *Treas.* R.

3,000 dollars. BOSTON, *May* 10, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., three thousand dollars to pay draft of E. D. Childs, sec'y.

Cleveland, Ohio, May 8, '72.

H. B. WILBUR, *Treas.* R.

2,500 dollars. BOSTON, *May* 14, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., twenty-five hundred dollars to pay draft of E. D. Childs, sec'y, of May 11, 1872.

H. B. WILBUR, *Treas.* R.

4,000 dollars. BOSTON, *May* 15, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., four thousand dollars to pay draft of E. D. Childs, sec'y, of May 11, '72.

H. B. WILBUR, *Treas.* R.

1,500. BOSTON, *May* 15, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., fifteen hundred dollars to pay draft of E. D. Childs, sec'y, of May 13, 1872.

H. B. WILBUR, *Treas.* R. 23,150 50

(May, 1872, ac.) 1,500 dollars.

BOSTON, *May 20th*, 1872.

Received of Gen. Geo. Stark, man'r B. & L. R. R., fifteen hundred dollars to pay draft of E. D. Childs, sec'y, fav. J. Colwell, dated May 17, '72.

H. B. WILBUR,
Trs. N. T. Co.

1,500. BOSTON, *May* 21, 1872.

Received of Geo. Stark, manager B L. & N. R. R., fifteen hundred dollars to pay d'ft E. D. Childs, sec'y, favor J. Colwell, Esq., cashier.

H. B. WILBUR,
Tr. N. T. Co.,
Pr. A. GOSHAM.

$1,500. BOSTON, *May 23d*, 1872.

Received of Gen. Geo. Stark, man. B. L. & N. R. R., fifteen hundred dollars to pay draft of E. D. Childs, sec'y.

Cleveland, May 21, 1872.

H. B. WILBUR, *Treas.* R.

$1,500. BOSTON, *May* 24, 1872.

Received of Gen. Geo. Stark fifteen hundred dollars, to be used in paying E. D. Childs, sec'y, draft dated May 22 of $1,500, fav. J. Colwell, cash'r.

H. B. WILBUR,
Treas'r Northern Transp'n Co.

$1,500. BOSTON, *May* 29, 1872.

Received of Gen. Geo. Stark, manager B. L. & N. R. R., fifteen hundred dollars to pay draft of E. D. Childs, sec'y, of date May 27, 1872.

H. B. WILBUR, *Treas.* R. 7,500

206 (May, 1872, ac.) $10,834.70.

BOSTON, *June* 18, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. R. R., ten thousand eight hundred thirty-four $\frac{70}{100}$ dollars, on account N. T. C.

NORTHERN TRANSPORTATION CO.
OF OHIO,
By H. B. WILBUR, *Treas'r.*

$6,000. BOSTON, *June* 19, 1872.

Received of Gen. Geo. Stark six thousand dollars, to me in paying E. D. Childs, sec'y, draft of June 17, same amount.

NORTHERN TRANSPORTATION CO.
OF OHIO,
By H. B. WILBUR, *Treas'r.*

$4,049.49. BOSTON, *June* 22, 1872.

Received of Gen. Geo. Stark four thousand forty-nine $\frac{49}{100}$ dollars to pay W. J. Walker & Co. draft.

H. B. WILBUR,
Tr. Northern Transp. Co.

$2,000. BOSTON, *June* 22, 1872.

Received of Gen. Geo. Stark two thousand dollars to pay E. D. Childs draft of June 18.

H. B. WILBUR,
Tr. Northern Transp. Co.

$1,604.26. BOSTON, *June* 22, 1872.

Received of Gen. Geo. Stark sixteen hundred four $\frac{26}{100}$ dollars, to be remitted to agent Grand Trunk R. R. at Sarnia.

H. B. WILBUR,
Treas'r Northern Transp. Co.

$638. BOSTON, *June* 22, 1872.

Received of Gen. Geo. Stark six hundred thirty-eight dollars, to pay John G. Fisher draft, favor O. J. Hale.

H. B. WILBUR,
Treas'r Northern Transportation Co. 25,126 45

(July, 1872, ac.) $5,000.

BOSTON, *Aug't 16th*, 1872.

Received of Gen. Geo. Stark five thousand dollars, to be used in paying drafts of Eddy, Allison & Fisher.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 5,000

(July, 1872, ac.) $11,000.

BOSTON, *Aug. 6th*, 1872.

Received of Gen. Geo. Stark eleven thousand dollars on ac.

H. B. WILBUR,
Treas'r N. T. Co.

$5,000. BOSTON, *Aug't 10th*, 1872.

Received of Gen. Geo. Stark five thousand dollars to pay drafts of agents N. T. Co.

H. B. WILBUR,
Treas'r Northern Trans'n Co. 16,000

(July, 1872, ac.) $8,036.10.

BOSTON, *June 28th*, 1872.

Received of Gen. Geo. Stark eight thousand thirty-six $\frac{10}{100}$ dollars to buy gold to remit to J. S. Nesbit, $2,110.74.—J. & T. Conlon. $1,521.—G. A. Clark, $3,448,52, $7,080.26 *@* 113½.
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H. B. WILBUR,
Treasurer Northern Transp'n Co.

$352.75. BOSTON, *June 28th*, 1872.

Received of Gen. Geo. Stark three hundred fifty-two $\frac{75}{100}$ dollars, to remit to O. Breed, agent, for bills paid by him.

H. B. WILBUR,
Treas'r Northern Transp'n Co.

2,159.16. BOSTON, *July 1st*, 1872.

Received of Gen. Geo. Stark twenty-one hundred fifty-nine $\frac{16}{100}$ dollars, to be used in paying Chas. Allison's draft.

NORTHERN TRANSP'N CO.,
By H. B. WILBUR, *Treas.*

$2,280. BOSTON, *July 1st*, 1872.

Received of Gen. Geo. Stark twenty-two hundred eighty dollars, to buy gold to pay note at St. Catherines.

NORTHERN TRANSP'N CO.,
By H. B. WILBUR, *Tr's.*

$1,325. BOSTON, 1872.

Received of Gen. Geo. Stark thirteen hundred twenty-five dollars, to pay E. D. Childs, draft for $1,000. $325.

NORTHERN TRANSP'N CO.,
By H. B. WILBUR, *Treas'r.*

$5,000. BOSTON, *July 8th*, 1872.

Received of Gen. Geo. Stark five thousand dollars, to be used in remittance to H. F. Church, agent N. T. Co.

H. B. WILBUR,
Treas'r Northern Transp'n Co. of Ohio.

$12,000. BOSTON, *July 11th*, 1872.

Received of Gen. Geo. Stark twelve thousand dollars, to be sent to O. Breed, agent, to pay coupons on N. T. Co. bonds.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio.

$1,890. BOSTON, *July 17th*, 1872.

Received of Gen. Geo. Stark eighteen hundred ninety dollars, to be used in paying A. W. French, agent's, drafts.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio.

$996.66. BOSTON, *July 17th*, 1872.

Received of Gen. Geo. Stark nine hundred ninety-six $\frac{66}{100}$ dollars, to be used in paying Chas. Allison's, ag't, draft.

H. B. WILBUR,
Treas'r Northern Transp'n Co. of Ohio.

$750. BOSTON, *July* 18, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. R. R., seven hundred fifty dollars, to pay dr'ft of A. W. French, ag't, in favor of D. P. Dobbins & Son.

H. B. WILBUR,
Treas. Northern Trans. Co. of Ohio.

$700. BOSTON, *July* 18, 1872.

Received of Gen. Geo. Stark seven hundred dollars, to be used in paying John S. Fisher, draft.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 35,489 67

208 (Sept., 1872, ac.) $5,000.

BOSTON, *Oct.* 18*th*, 1872.

Rec'd of Gen. Geo. Stark, manager Boston & Lowell & Nashua & Lowell R. Road, five thousand dollars, to be used in paying notes & drafts on ac. Northern Transportation Co.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 5,000

(Sept., 1872, ac.) BOSTON, *Oct'r* 5, 1872.

Received of Gen. Geo. Stark fifteen thousand dollars, to be used in paying notes & drafts.

H. B. WILBUR,
Treas'r N. T. Co.

MEMO.—Chamberlin note & int., 13,839.46; Childs' draft, 446.67 = 14,286.13. 15,000

(Sept., 1872, ac.) $1,933.03.

BOSTON, *Oct.* 8*th*, 1872.

Rec'd of Gen. Geo. Stark, manager Boston & Lowell & N. L. R. R., nineteen hundred thirty-three dollars $\frac{3}{100}$ths, to be used in paying J. W. Gordon's draft for wood for N. T. Co.

H. B. WILBUR,
Treas'r N. T. Co.

Draft, gold, 171,065, @ 113, 1,933.03. 1,933 03

(Journal entry, page 260. See Vou. No. 1802, J. S. Kidder, Sept., 1872, ac.) To their pro. in settlement with J. S. Kidder. 872 30

Copy of J. S. Kidder's bill, viz:

Northern Transp't Co. to J. S. Kidder & Co.

1864.			
July 6.	1 bbl. H and A flour	12 75	
	44 bbls. City A	550	
Aug. 27.	1 bbl. Cleveland	12 25	
	1 bbl. Merrimack	11 50	
		586 50	
	Less 50 per cent.	293 25	
		293 25	
July 23.	To overcharge on ft., 650 bbls., propeller Ogdensburgh, 10c.	$65	

1871.

Aug. 18. To proceeds of sale of 2,482[17] bu. corn, in transit on propeller Akron	1,356 27	
Int. at 7 per ct. to Sept. 18	102 85	
	$1,817 37	
Deduct moneys in hands of — Bell, trustee	651 82	
	1,165 55	

Received payment:

J. S. KIDDER & CO.

Approved: GEO. STARK,
Executive Committee N. T. Co.

(Octo., 1872, ac.)

C. E. A. Bartlett, Esq., cashier, please pay to H. B. Wilbur, treas'r of Northern Transportation Company, seventeen thousand dollars, for disbursement, and charge the same to account of Vermont Central Line.

$17,000. GEO. STARK, *Manager.*

$17,000. BOSTON, *Nov.* 15, 1872.

Rec'd of Geo. Stark, manager, seventeen thousand dollars, to be used for disbursements for Northern Transportation Co.

H. B. WILBUR,
Treas'r N. T. Co. 17,000

209 (Octo., 1872, ac.) $6,400.

BOSTON, *Nov.* 15, 1872.

Received of Geo. Stark, manager B. & L. R. road, six thousand four hundred dollars, to be used in paying drafts for wood.

H. B. WILBUR,
Treas'r Northern Transportation Co.

App'd:
GEO. STARK, *Manager.* 6,400

(Oct., 1872, ac.) $1,188.

BOSTON, *Octo.* 25, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., eleven hundred eighty-eight dollars, to be used in paying J. S. Nesbit's draft.

NORTHERN TRANSPORTATION CO.,
By H. B. WILBUR, *Tr's.*

Mr. Bartlett will please pay this and charge to V. C. Line.

GEO. STARK, *Manager.* 1,188

(Octo., 1872, ac.) $5,067.04.

BOSTON, *Oct.* 22, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., five thousand sixty-seven $\frac{4}{100}$ dollars, to be used in paying ac. to W. T. Walker & Co.

NORTHERN TRANSPORTATION CO.
OF OHIO,
By H. B. WILBUR, *Treas'r.* 5,067 04

(Oct., 1872, ac.) $1,577.18.

BOSTON, *Octo.* 22, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., fifteen hundred seventy-seven $\frac{18}{100}$ dollars, to be used towards paying G. A. Clark's draft.

NORTHERN TRANSPORTATION CO.
OF OHIO,
By H. B. WILBUR, *Tr's.*

Mr. Bartlett will please pay and charge to V. C. Line.
GEO. STARK, *Manager.* 1,577 18

(Oct., 1872, ac.)

BOSTON, *Nov.* 19*th*, 1872.

C. E. A. BARTLETT, Esq., *Cashier:*

Please pay D. D. Ranlett, for account of H. B. Wilbur, treas'r Northern Transportation Co., five thousand dollars, and chg. the same to Vermont Central Line.

Yours, GEO. STARK, *Manager.*

$5,000. BOSTON, *Nov.* 19, 1872.

Rec'd of C. E. A. Bartlett, Esq., five thousand dollars ($5,000), as above order

D. D. RANLETT,
For H. B. Wilbur, Treas'r No. Trans. Co. of Ohio. 5,000

(Nov., 1872, ac.) $1,000.

BOSTON, *Dec.* 20*th*, 1872.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., one thousand dollars, to use in paying draft J. & T. Conlon for wood.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 1,000

(Nov., 1872, ac.) $14,000.

BOSTON, *Dec.* 18*th*, 1872.

Received of Gen. Geo. Stark, man'r B. & L. & N.
210 & L. R. R., fourteen thousand dollars, to be used in paying note due Chamberlin by N. T. Co.

H. B. WILBUR,
Treas'r N. T. Co. 14,000

(Nov., 1872, ac.) $4,000.

BOSTON, *Dec. 6th*, 1872.

Received of Gen. Geo. Stark four thousand dollars, on ac. N. T. Co.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 4,000

(Nov., 1872, ac.) $8,000.

BOSTON, *Dec. 3d*, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., eight thousand dollars, to be used in making payments for N. T. Co.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 8,000

(Nov., 1872, ac.) $10,000.

BOSTON, *Dec. 11th*, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., ten thousand dollars, to be used in disbursements for N. T. Co.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 10,000

(Nov., 1872, ac.) $651.86.

BOSTON, *Dec. 9th*, 1872.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., six hundred fifty-one $\frac{80}{100}$ dollars, on ac. N. T. Co.

H. B. WILBUR,
Treas'r N. T. Co. 651 80

(Nov., 1872, ac.) $3,000.

BOSTON, *Dec.* 14, 1872.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., three thousand dollars, on ac. N. T. Co.

H. B. WILBUR,
Treasurer Northern Transportation Co. of Ohio. 3,000

(Dec., 1872, ac.) $2,500.

BOSTON, *Jan'y* 18, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., twenty-five hundred dollars, to be used in paying draft of G. A. Eddy, sup't.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 2,500

(Dec., 1872, ac.) $1,200.

BOSTON, *Jan'y* 15, 1872.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., twelve hundred dollars, to be used in paying draft of A. W. French, agent.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 1,200

(Dec., 1872, ac.) $5,000.

BOSTON, *Dec.* 24, 1872.

Received of Gen. Geo. Stark, man'r Boston & Lowell R. R. & N. & L. R. R., five thousand dollars, on account.

H. B. WILBUR,
Treas'r N. T. Co. 5,000

211 (Dec., 1872, ac.) $500.

BOSTON, *Jan'y* 11, 1873.

Received of treas'r Boston & L. & N. & L. R. R., five hundred, to be used in disbursements for N. T. Co.

H. B. WILBUR,
Trs. Northern Transp'n Co. 500

(Dec., 1872, ac.) $12,000.

BOSTON, *Jan'y* 13, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., twelve thousand dollars, to be used in paying coupons.

H. B. WILBUR,
Trs. Northern Transp'n Co. 12,000

(Dec., 1872, ac.) $4,000.

BOSTON, *Jan'y* 2, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., four thousand dollars, to be used in paying drafts, etc., of agent N. T. Co.

NORTHERN TRANSP'N CO.,
By H. B. WILBUR, *Treas'r.* 4,000

(Dec., 1872, ac.) $500.

BOSTON, *January 8th*, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., five hundred dollars, on account.

NORTHERN TRANSPORTATION CO.
OF OHIO,
By H. B. WILBUR, *Treas'r.* 500

(Jan., 1873, ac.) $1,000.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., Boston, Feb'y 17, 1873, one thousand dollars, to pay drafts and bills ac. N. T. Co.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 1,000

(Jan., 1873.) $3,783.16.

BOSTON, *Jan'y* 29, 1873.

Received of Gen. Geo. Stark, man'r B. & L. R. R., thirty-seven hundred eighty-three $\frac{16}{100}$ dollars, to be used in paying H. F. Church, ag't, draft.

H. B. WILBUR,
Treas'r Northern Transportation Co. 3,783 16

(Jan., 1873, ac.) $1,000.

BOSTON, *Feb'y* 8, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R, one thousand dollars, to be used in paying draft of A. W. French, ag't.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 1,000

(Jan., 1873, ac.) $3,000.

BOSTON, *Feb'y* 11, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., three thousand dollars, to be used in paying draft of G. A. Eddy, sup't.

H. B. WILBUR,
Treas. Northern Transp'n Co. 3,000

212 (Feb., 1873.) $15,244.

BOSTON, *March* 18, 1873.

Received of Gen. Geo. Stark, man. B., L. & Nashua, fifteen thousand two hundred forty-four dollars, on ac. Northern Transportation Co.

H. B. WILBUR,
Treas. Northern Trans. Co. of Ohio,
By D. D. RANLETT. 15,244

(Feb., 1873, ac.) $3,500.

BOSTON, *March* 4, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R., thirty-five hundred dollars, to be used in paying G. A. Eddy's draft.

H. B. WILBUR,
Treas'r Northern Transp. Co. 3,500

(March, 1873, ac.) $150.

BOSTON, *Apr. 5th*, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., one hundred fifty dollars, being draft of E. D. Childs paid by Gen. Stark.

H. B. WILBUR,
Treas'r Northern Transp'n Co. 150

(March, 1873, ac.) $300.

BOSTON, *Apr.* 2, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R., three hundred, to pay draft of B. H. McClain, ag't, Glen Haven.

H. B. WILBUR,
Trs. N. T. Co. 300

(March, 1873, ac.) $6,778.75.

BOSTON, *M'ch* 29, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., sixty-seven hundred seventy-eight $\frac{75}{100}$ dollars, to be used in paying insurance notes due this day.

H. B. WILBUR,
Treas'r Northern Transportation Co. 6,778 75

(March, 1873, ac.) $2,900.

BOSTON, *March* 31, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., twenty-nine hundred dollars, to pay notes due April 1.

H. B. WILBUR,
Treas'r Northern Transportation Co.

$355. BOSTON, *March* 31, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., three hundred fifty-five dollars, to pay insurance notes due this day.

H. B. WILBUR,
Treas'r Northern Transportation Co. 3,255

(March, 1873, ac.) $500.

BOSTON, *April* 12, 1883.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., five hundred dollars, to be used in paying G. A. Eddy draft.

H. B. WILBUR,
Treas'r Northern Transportation Co. 500 00

213 (March, 1873, ac.) $1,500.

BOSTON, *Apr.* 19, 1878.

Received of Gen. Geo. Stark, man'r B. & L. R. R., fifteen hundred dollars to be used in paying draft of ———, agent, on L. Millis, gen. agt.

H. B. WILBUR,
Treas'r Northern Transportation Co.

$1,500. BOSTON, *April 19th*, 1873.

Received of Gen. Geo. Stark, man'r B. & L. R. R., fifteen hundred dollars to be used in paying draft of G. A. Eddy, sup.

H. B. WILBUR,
Treas. Northern Transp'n Co. 3,000

(March, 1873, ac.)

BOSTON, *Ap'l* 1, 1873.

Northern Transportation Co., by Boston & Lowell and Nashua & Lowell Railroads. To George Stark, Dr. To services as executive committee in management of the affairs of the company, one year to date, $2,500.00. Received payment,

GEO. STARK. 2,500

(April, 1873, ac.) $2,492.75.

BOSTON, *May* 18, 1873.

Received of Geo. Stark, man. Boston & L. & N. & L. R. R., twenty-four hundred ninety-two $\frac{75}{100}$ dollars, to be used in paying Nesbit's draft for wood, $2,252.75, & R. H. McClain, agent. Draft ^{240}.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio.
App. GEO. STARK, *Manager.* 2,492 75

(April, 1873, ac.) $275.

BOSTON, *April* 19, 1873.

Received of Gen. Geo. Stark, man'r B. & L. R. R., two hundred seventy-five dollars, to be used in paying two insurance notes due to-day.

H. B. WILBUR,
Trs. N. T. Co.
App. GEO. STARK, *Manager.* 275

(April, 1873, ac.) $1,500.

BOSTON, *May* 10, 1873.

Received of Geo. Stark, manager B. & L. & N. & L. R. R., fifteen hundred dollars, to be used in pay. Rodier draft on L. Millis, ag't.

H. B. WILBUR,
Treas'r Northern Transp. Co. 1,500

(April, 1873, ac.) $800.

BOSTON, *May* 6, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., eight hundred dollars, to be used in paying note & draft ac. N. T. Co.

H. B. WILBUR,
Treas'r Northern Transportation Co. of Ohio. 800

214 (April, 1873, ac. $804.39.

BOSTON, *Apr.* 28, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., eight hundred four $\frac{39}{100}$ dollars, to make payments mentioned on back of this receipt.

H. B. WILBUR,
Treas. N. T. Co. of Ohio. 804 39

Note due $\frac{2}{29}$,	137 50		
Do.	137 50		
Do.	300		
Telegraph bill,	171 62	Rec. App'd.	GEO. STARK,
Do.	57 77	Jan'y.	*Manager.*
	$804 39		

April, 1873, ac. $4,000.

BOSTON, *May* 14, 1873.

Received of Geo. Stark, man. B. & L. & N. & L. R. R., four thousand dollars, to pay draft O. Breed, ag't.

H. B. WILBUR,
Tr. N. T. Co. 4,000 00

April, 1873, ac. $1,500.

BOSTON, *May* 16, 1873.

Received of Geo. Stark, man. B. & L. & N. & L. R. R., fifteen hundred dollars, to pay Rodier, agent, draft.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 1,500 00

April, 1873, ac. $5,000.

BOSTON, *May 15th*, 1873.

Received of Geo. Stark, manager B. & L. & N. & L. R. R., five thousand dollars, to be used in paying Eddy's draft, due this day.

H. B. WILBUR,
Treas. N. T. Co. 5,000 00

May, 1873, ac. $14,696.97.

BOSTON, *June 18th*, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., fourteen thousand six hundred ninety-six

$\frac{97}{100}$ dollars, to be used in paying note to Chamberlin, due this day.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 14,696 97

May, 1873, ac. $1,200.

BOSTON, *May* 21, 1873.

Received of Geo. Stark, manager B. & L. & N & L. R. R., twelve hundred dollars, to pay Eddy's Sept. draft for int. on note paid Judson Bank.

H. B. WILBUR,
Treas. Northern Transp. Co. 1,200 00

215 May, 1873, ac. $2,950.

BOSTON, *May* 26, 1873.

Received of Gen. Geo. Stark, man'r B. & L. & N. & L. R. R., twenty-nine hundred fifty dollars, to pay draft of G. A. Clark for wood.

H. B. WILBUR,
Treas. Northern Transp. Co. 2,950 00

May, 1873, ac. $1,893.

BOSTON, *May* 22, 1873.

Received of Geo. Stark, man. B. & L. & N. & L. R. R., eighteen hundred ninety-three dollars, to pay draft on Milliss, for Nesbitt & Fisher, wood.

Bills, $1,800, & draft on Wilbur from R. H. McClair, ag't.
" 93

1,893

H. B. WILBUR,
Treas. N. T. Co. 1,893 00

May, 1873, ac.

$2,655
980 58

$3,635 58

BOSTON, *May* 23, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., thirty-six hundred thirty-five $\frac{58}{100}$ dollars, to pay ins. notes & A. W. French draft.

H. B. WILBUR,
Treas. Northern Transp. Co. 3,635 58

May, 1873, ac. $1,875.

BOSTON, *May* 27, 1873.

Received of Gen. Geo. Stark, man. B. & L. R. R., eighteen hundred & seventy-five dollars, to pay draft of A. W. French, secretary.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 1,875 00

June, 1873, ac. $6,000.

BOSTON, *June* 23, 1873.

Received of Geo. Stark, gen. man. B. & L. & N. & L. R. R., six thousand dollars, to be used in paying drafts of agents N. T. Co.

NORTHERN TRANSPORTATION CO. OF OHIO,
By H. B. WILBUR, *Treas.* 6,000 00

216 June, 1873, ac. $12,000.

BOSTON, *July* 12, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twelve thousand dollars, to be used in paying coupons due on N. T. Co. bonds.

H. B. WILBUR,
Treas. N. T. Co. 12,000 00

(July, 1873, ac.) $2,300.

BOSTON, *Aug.* 18, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twenty-three hundred dollars, to be used in paying J. W. Gordon's draft for wood bills.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 2,300

(July, 1873, ac.) $4,504.50.

BOSTON, *Aug. 5th*, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., four thousand five hundred four $\frac{50}{100}$ dollars, to be used in paying draft of White & Clark.

H. B. WILBUR,
Treasurer Northern Transportation Co. 4,504 50

(July, 1873, ac.) $2,300.

BOSTON, *Aug't 9th*, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twenty-three hundred dollars, to be used in paying draft of G. A. Clark for wood.

H. B. WILBUR,
Treas. N. T. Co. 2,300

(Aug., 1873, ac.) $2,500.

BOSTON, *Sept.* 15, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twenty-five hundred dollars, to be used in paying draft of G. A. Clark for wood.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 2,500

(Aug., 1873, ac.) $4,000.

BOSTON, *Sep. 13th*, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., four thousand dollars, to pay draft of A. W. French, ag't.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 4,000

(Aug., 1873, ac.) $4,900.

BOSTON, *Sept. 18th*, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., forty-nine hundred dollars, to be used in paying drafts of J. & T. Colon and J. W. Gordon, due this day.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 4,900

217 (Sept., 1873, ac.) $2,200.

BOSTON, *Oct.* 16, 1873.

Received of Boston, L. & Nashua R. R. Co. twenty-two hundred dollars, on ac. of the Northern Transportation Co.

H. B. WILBUR,
Treas. No. Trans. Co. of Ohio,
By D. D. RANLETT. 2,200

(Sept., 1873, ac.) $5,000.

BOSTON, *Oct.* 18, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., five thousand dollars, to be used in making payments on ac. N. T. Co.

H. B. WILBUR,
Treas. Northern Transp'n Co. 5,000

(Sep., 1873, ac.)

$2,437 50	Note.
2,325	Draft.
$4,762 50	

BOSTON, *Oct.* 20, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., forty-seven hundred sixty-two $\frac{50}{100}$ dollars, to be used in paying draft & note, ac. N. T. Co.

H. B. WILBUR,
Treas. Northern Transportation Co. 4,762 50

(Sept., 1873, ac.) $1,300.

BOSTON, *Oct. 6th*, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., thirteen hundred dollars, to be used in paying draft for wood, 1,176 gold, due this day.

H. B. WILBUR,
Trs. Northern Transp. Co. 1,300

(Sept., 1873, ac.) $2,500.

BOSTON, *Sep.* 29, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twenty-five hundred dollars, to buy gold to pay G. A. Clark draft, due this day.

H. B. WILBUR,
Trs. N. T. Co. 2,500

(Oct., 1873, ac.) $4,000.

BOSTON, *Nov.* 13, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., four thousand dollars, to send to O. Breed, ag't, to pay coupons.

H. B. WILBUR,
Treas. N. T. Co. 4,000

(Oct., 1873, ac.) $2,500.

BOSTON, *Nov.* 11*th*, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., twenty-five hundred dollars, to use in paying G. A. Clark's draft.

H. B. WILBUR,
Treas. North'n Transp. Co. of Ohio. 2,500

218 (Oct., 1873, ac.) $16,200.

BOSTON, *Nov.* 16, 1873.

Received of Geo. Stark, man. B. & L. & N. & L. R. R., sixteen thousand two hundred dollars, to pay note & int. to 4th Nat. B'k, N. Y.

H. B. WILBUR,
Tr's N. T. Co. 16,200

Oct., 1873, ac. $2,000.

BOSTON, *Oct.* 25, 1873.

Received of B. L. & Nashua R. R. two thousand dollars, to pay draft of G. A. Clark for 1,765.62 gold.

H. B. WILBUR, *Treas.*,
By RANLETT. 2,000

Oct., 1873, ac. $4,800.

BOSTON, *Nov.* 18, 1873.

Received of Gen. Geo. Stark, man. B. & L., N. & L. R. R., forty-eight hundred dollars, to pay draft of J. W. Gordon & J. & T. Conlon.

H. B. WILBUR,
Treas. N. Transp. Co. 4,800 00

3,040 80
304 08
1,405 50

4,750 38

Nov., 1873, ac. $5,000.

BOSTON, *Dec.* 19, 1873.

Received of the Boston & Lowell and Nashua & Lowell R. R. Co. five thousand dollars, on ac. No. Trans. Co.

H. B. WILBUR,
Treas. No. Trans. Co. of Ohio,
By RANLETT. 5,000 00

Nov., 1873, ac. $700.

BOSTON, *Dec.* 12, 1873.

Received of B. & L. & Nashua R. R. Co. seven hundred dollars, on ac. No. Trans. Co.

H. B. WILBUR,
Treas. No. Trans. Co. of Ohio,
By RANLETT. 700

Nov., 1873, ac. $5,000.

BOSTON, *Nov.* 24, 1873.

Received of Geo. Stark, man. B. & L. & N. & L. R. R., five thousand dollars, to be used in paying notes & drafts.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 5,000

219 Nov., 1873, ac. 5,238.82.

BOSTON, *December* 8, 1873.

Received of the Boston & Lowell and Nashua & Lowell R. R. Co. fifty-two hundred & thirty-eight dollars $\frac{82}{100}$, on ac. No. Trans. Co.

H. B. WILBUR,
Treas. No. Trans. Co. of Ohio,
By RANLETT. 5,238 82

Dec., 1873, ac. $350.

BOSTON, *Jan.* 5, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., three hundred fifty dollars, to be used in paymg notes due this day.

H. B. WILBUR,
Treas. N. T. Co. 350 00

Dec., 1873, ac. $350.

BOSTON, *January* 9, 1873.

Received of Gen. Geo. Stark, manager B. & L. & N. & L. R. R., three hundred fifty dollars, to pay note due this day.

H. B. WILBUR,
Treas. N. T. Co. 350 00

Dec., 1873, ac. $3,000.

BOSTON, *Jan'y* 17, 1873.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. Road, three thousand dollars, to be used in paying draft of A. W. French, sec'y.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 3,000 00

Dec. 1873, ac. $12,800.

BOSTON, *January* 12, 1874.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., twelve thousand eight hundred dollars, to pay draft of Rodier, 800, and coupons in New York, 12,000.

H. B. WILBUR,
Treas. Northern Transp. Co. of Ohio. 12,800

Jan., 1874, ac. $1,000.

BOSTON, *January* 29, 1874.

Received of Gen Geo. Stark, man. B. &. L. & N. & L. R. R., one thousand dollars, to be used in paying draft of A. J. Rodier, ag't.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 1,000

220 Jan., 1874, ac., $2,000.

BOSTON, *Jan.* 27, 1874.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. road, two thousand dollars, to be used in paying draft of A. W. French, secretary.

H. B. WILBUR,
Treas. Northern Transportation Co. 2,000 00

Jan., 1874, ac., $1,000.

BOSTON, *Jan'y* 19, 1874.

Received of Gen. Geo. Stark, man. B. & L. & N. & L. R. R., one thousand dollars, to be used in paying draft of A. J. Rodier, agent.

H. B. WILBUR,
Treas. Northern Transportation Co. of Ohio. 1,000

Jan., 1874, ac., 1,000.

DETROIT, *February* 14, 18[7]4.

Pay to the order of Emery Wendell, Esq., cash'r, one thousand dollars, value received, and charge the same to account of A. J. Rodier, ag't.

To H. B. WILBUR, Esq., treas., Boston, Mass. 1,000

Apr., 1874, $4,000.

ST. ALBANS, *May* 13, 1874.

At sight pay to the order of A. Sowles, Esq., cashier, four thousand dollars, and charge the same to account of this co. as advised.

CENTRAL VERMONT R. R. CO.,
As Receivers & Manager Vermont Central & Vermont & Canada R. R.
By H. C. LOCKWOOD, *Treas.*

To C. E. A. BARTLETT, Esq., *Treas.*
Boston, Lowell & Nashua R. R., Boston, Mass.

BOSTON, *May* 12, 1874.

To H. C. LOCKWOOD,
Treas. Central Vt. R. R., St Albans, Vt.:

If you wish us to advance the funds for No. Transportation Co. coupons, and charge to line, we can do so, & you can draw on me for four thousand dollars.
(Sig.) C. E. A. BARTLETT. 4,000 00

221 April, 1875, ac. $12,000.

BOSTON, *May* 11, 1875.

Vermont Central Line for acc't Northern Transportation Co. By Boston, Lowell & Nashua Railroad Co., to C. E. A. Bartlett, cashier, Dr.

To amount paid to sundry persons on coupons due January 15, 1875, of the Northern Transportation Company of Ohio bonds, paid May 11, 1875.
C. E. A. BARTLETT, *Cashier.*

Coupons in possession of cashier B. L. & N. R. R.---- 12,000 00

$566,354 01

Northern R. R. pro of above payments--- 67,866 38
Boston & L. " " " " --- 25,693 13

Deposition of Charles S. Mellen.

Direct examination by J. H. BENTON, Jr., Esq., of counsel for defendants:

Int. 1. What is your full name, your residence, and your business?

Ans. Charles S. Mellen; reside in Arlington, Mass.; am superintendent of the Boston and Lowell Railroad.

Int. 2. Did you and H. B. Wilbur act under an agreement filed in this cause on the twentieth day of May, 1882, with reference to ascertaining the tonnage of freight and the receipts under the Northern Transportation Company contract, a copy of which is annexed to the plaintiff's bill?

Ans. I did.

Int. 3. What corporation, if any, furnished information upon which you and Mr. Wilbur acted under that agreement?

Ans. The information first furnished us was from the Ogdensburg and Lake Champlain railroad. This was found after a few days' examination to be insufficient, and the Boston and Lowell and Nashua and Lowell, the Northern railroad and the Concord railroad furnished such information as was in their possession, including their books, and these records were found as we progressed in the examination to be insufficient to a complete accounting, and the Vermont Central furnished such information and books as were in their possession. The books and papers of all the roads com-
222 bined were not so complete as we should have desired, but we thought we were able to arrive at approximately the result, which is given in our report.

Int. 4. What proportion of the information upon which you acted was furnished by the Ogdensburg road?

Ans. I should be unable to give the exact proportion, but much the largest proportion.

Int. 5. How long a time did your examination take; about how long?

Ans. Including the interruptions which we had (we had several), the time we were engaged upon the work was from the time of the signing of the agreement until I filed my report, the 10th of November, I believe.

Int. 6. Was this work all done by you and Mr. Wilbur personally?

Ans. The work upon my side I gave my personal attention to, being absent during the progress of the work only two or three days, and then I had an efficient head clerk who had instructions as to what to do during by absence, which was unavoidable.

Int. 7. Now, Mr. Mellen, what did you ascertain to be the total tonnage of freight brought by the boats of the Northern Transportation Company to the line composed of the roads of the parties of the third part to this contract, or to any roads leased or operated by them or either of them, from the first day of March, 1871, to the close of business of the Transportation Company for the year 1874?

(Objected to, as being matter shown by the report of the witness.)

Ans. I should be unable to answer that question from memory, but the report I left with yourself, Mr. Benton, and Mr. Bartlett, showed the result of my examination and gave the information for which you ask.

Int. 8. Will you refresh your memory from that report and state what the tonnage was?

Report shown to witness.

(Objected to, as being matter shown by the report of the witness.)

Ans. The amount of tonnage brought by the boats of the North-

ern Transportation Company to the line composed of the
223 roads of the parties of the third part to the contract I found on the examination referred to to be 577,584,843 pounds.

Int. 9. What did you ascertain the gross receipts from that tonnage to be upon the line of the roads of the parties of the third part, and upon those leased or operated by them or either of them?

(Objected to, as being matter shown by the report of the witness.)

Ans. $1,182,306.30.

Int. 10. Did you ascertain what the gross receipts of the Boston and Lowell railroad were from the first day of March, 1871, to the close of business for the year 1874, from that business?

(Objected to, as being matter shown by the report of the witness.)

Ans. I found that the Boston and Lowell railroad received $10,659.66.

Int. 11. And what did you find the Northern railroad received from that freight during that time?

(Objected to, as being matter shown by the report of the witness.)

Ans. $53,125.97.

Int. 12. Were you during that time, from the 1st of March, 1871, to the close of business in 1874, in the employ of the Northern railroad; and, if so, in what capacity?

Ans. I was in the employ of the Northern railroad as a clerk in the office of the chief clerk and cashier during the time from March 1, 1871, until the 4th of March, 1872. From the 4th of March, 1872, to the 1st of January, 1873, I was employed as secretary to one of the officers of the Vermont Central railroad at St. Albans. From the 1st of January to the 1st of April, 1873, I was employed as secretary to the chief engineer of the Northern railroad, Mr. Shaw. From the 1st of April, 1873, until the close of the business of the Transportation Company in 1874, I was chief clerk and cashier of the Northern railroad.

Int. 13. Do you know whether the Northern railroad actually received this $53,000 of which you speak as its share of the receipts from this business?

Ans. I doubt if the Northern railroad actually received the $53,000. The money as I recollect was in the hands of the Boston and Lowell railroad. The accounts as rendered by the Vermont Central road to the Northern railroad, in which this $53,000
224 referred to was included, showed this amount of business or receipts to be due in connection with other business to the Northern railroad, the money for which was collected and applied to this contract by the Boston and Lowell railroad. I doubt if any of this $53,000 was ever received by the Northern railroad, although it went into the accounts. I will explain, in connection with this answer, that the Northern railroad received very little money on account of the business at its stations coming from or over the Vermont Central railroad. The business was mostly to stations on roads beyond its terminus, and although the Northern railroad re-

ceived in account from the Vermont Central railroad its pay due under the contract for hauling this business, the money in settlement of the balance due it was collected by other roads, in this instance by the Boston and Lowell railroad, and applied on account of the payments due or claimed to be due under this contract, instead of being paid to or through the Northern railroad.

Int. 14. Do you know what road collected the receipts from this business, that is to say, the receipts which you say amounted for the Northern railroad to $53,125.97?

Ans. The Boston and Lowell collected them very largely. The Concord railroad collected some, but to a less degree than the Boston and Lowell.

Int. 15. What part of it was collected by the Boston and Lowell as far as you can state?

Ans. It would be impossible for me to say what part collected by the Boston and Lowell. The Boston and Lowell railroad collected money on account of the Northern railroad for this business, also for the business going from and to stations upon the line of the Northern railroad. The Boston and Lowell railroad took for the uses of this contract all of the money that was due the Northern railroad upon all accounts; not only that road, but of other railroads that were operated by the same officers as the Northern railroad; their funds were all seized, held and applied on account of the payments of this and other contracts, so that, as I recollect, the Northern railroad was at one time seriously cramped by the action of the Boston and Lowell railroad in this matter, and very earnestly protested
225 against its act. The proportion of this particular $53,000 referred to that was collected by the Boston and Lowell railroad, while a large proportion undoubtedly was collected by it, there was not a sufficient portion collected to have warranted the payment of it under this contract, as I recollect the matter, and the Boston and Lowell railroad was in consequence obliged to take other balances due upon business to the Northern road in order to make this payment.

Int. 16. Did you, as chief clerk and cashier of the Northern road, know how much money was applied by the Lowell railroad, under this contract, by payments to the parties of the second part and the trustees of the sinking fund and the interest on the bonds?

Ans. We received statements at different times rendered by the Boston and Lowell railroad which claimed to be statements of the amount they had paid on account of this and other contracts, but as to the proportion of those payments that was due from the Northern railroad there was no accounting made or statement rendered by the Boston and Lowell railroad up to some time in the year 1874, if I recollect correctly.

Int. 17. Do you know how much money belonging to the Northern railroad, or due to the Northern railroad from the Lowell, was applied by the Lowell under the provisions of the Transportation Company contract?

Ans. I don't know the exact amount, but I can remember sufficiently in connection with this matter to state that it was largely in

excess of this $53,000. As to any precise amount, I should be unable from memory to state.

(Adjourned.)

JUNE 27, 1883.

Cross-examination by SIDNEY BARTLETT, Esq., of counsel for complainant:

Cross-int. 18. In making your account you assumed, did you not, that Sullivan railroad and the New London and Northern Railroad Company were leased or operated by the Vermont Central and Vermont and Canada or their trustees and managers, and you made up your account accordingly? In this did Mr. Wilbur agree with you or not?

(Objected to, by Mr. Benton. The report shows for itself.)

226 Ans. I did so assume, and Mr. Wilbur instructed me that he was instructed not to include those roads as leased roads of the Vermont Central and Vermont and Canada railroads in his report.

Cross-int. 19. What evidence had you before you and Mr. Wilbur that those roads were so leased or operated?

Ans. We had the evidence of the tariffs of the Vermont Central railroad. I had, moreover, the experience of nearly a year's service in the employ of the Vermont Central railroad, and at that time I had always understood they were operated by the trustees and managers aforesaid.

Cross-int. 20. Were you aware before you gave this deposition that the deposition of Mr. Wilbur had been taken upon that point in this case, and that he stated that said roads were neither operated or leased as above stated?

Ans. I was aware of it. I had read Mr. Wilbur's deposition.

Cross-int. 21. Does Mr. Wilbur's report show the account correctly in your view if these roads were not so leased or operated?

Ans. I don't remember having seen Mr. Wilbur's report.

Cross-int. 22. Will you look at it and compare it with yours?

(Paper handed to witness by Mr. Bartlett.)

Ans. They do agree except in the particulars in which Mr. Wilbur's report states they disagree.

Cross-int. 23. In making up your account you assumed, did you not, that the Ogdensburg railroad was, within the meaning of the contract, one of the roads leased or operated by the Vermont Central and Vermont and Canada or their trustees and managers?

Ans. I did.

Cross-int. 24. When you said in answer to int. 3, that certain corporations or parties furnished you information, do you mean books and papers, or are you informed by any of the parties, and if so, by whom, when the above-mentioned roads were leased or operated by the Vermont Central and Vermont and Canada, or the trustees and managers, or had you any other evidence than you have stated above?

Ans. The information furnished by the parties was the books and papers; I don't know that I was informed by any one as to the roads above named being leased to the trustees and managers of
227 the Vermont Central and Vermont and Canada railroads. My reason for including the receipts of those roads with those of the Vermont Central railroad was on account of my connection with the different roads in the line, and my general understanding that they were so leased and operated.

Cross-int. 25. Was there among those books and papers to which you refer any lease of either of the said roads?

Ans. There was not, except of the Ogdensburg and Lake Champlain railroad.

Cross-int. 26. What do you mean by "In connection with other business" in your answer to int. 13 on page 6 of your deposition?

(Interrogatory and answer read to witness.)

Ans. The accounts rendered by the Vermont Central railroad to the Northern railroad showed not only the business coming from the Northern Transportation Company, but the business coming from and going to all stations this side of Ogdensburg, between Ogdensburg and White River Junction, all business coming from the Grand Trunk connection and other railroads and stations beyond the line of the Northern railroad, to or from which the Northern railroad had joint business connection or through billing.

Cross-int. 27. In stating the accounts annexed to your report you assumed, did you not, that by the true construction of the contract annexed to plaintiff's bill freights towed in boats by the Transportation Company, or in schooners chartered by that company, were not embraced therein?

(Objected to by Mr. Benton.)

Ans. I saw nothing in the books and papers given me to examine to indicate that there were any boats towed by the Northern Transportation Company, nor was there any evidence to convince me that there were any boats chartered by the Northern Transportation Company other than the steamers mentioned in the contract, and those built during the operation of the contract by the officers of the boat company.

Cross-int. 28. You also assumed, did you not, that by the true construction of that contract the gross receipts of each of each of the parties were, in stating the account, to be reduced by
228 elevator charges, car service, terminal charges, bridge tows, and a commission of ten per cent. to be allowed or paid to one of the parties?

(Objected to by Mr. Benton.)

Ans. I did not. I assumed that the receipts of each road were increased by these sums, not reduced. In other words, the parties who received these before-mentioned items should have included them in their gross receipts. I made my accounts on that understanding.

Direct examination resumed:

Int. 29. Did Mr. Wilbur state to you by whom he was instructed not to include the receipts of the Sullivan, New London and Northern roads in his report? If so, by whom did he say he was so instructed?

Ans. At the time I mentioned to Mr. Wilbur that I thought the receipts of those roads should be included in the receipts of the Vermont Central railroad, he said he would have to see Mr. Bartlett in relation to the matter, and he afterwards told me that he was instructed not to include them.

CHARLES S. MELLEN.

Attest: FISHER AMES, *U. S. Commissioner.*

229 *Stipulation.*

Circuit Court of the United States for the District of New Hampshire. May Term, 1884.

OGDENSBURG & LAKE CHAMPLAIN R. R. COMPANY
vs.
NASHUA & LOWELL R. R. CORPORATION.

Inasmuch as, in an opinion pronounced by this court in its judgment on demurrer in another cause, involving the construction of the same contract annexed to the plaintiff's bill in this case, it was in effect determined and declared that this same plaintiff was in no event entitled to recover under said contract against the parties of the third part (including the defendant), or any of them, any larger sum than might be found in the hands or possession of any such party of the third part, and which has accrued or arisen from
230 the gross receipts of the business mentioned in said contract as derived from the boats of the party of the first part during the time that the steamboats continued to run:

Now, in order to expedite the hearing of the appeal to be taken by plaintiff from such final judgment as may be rendered in this case, and for that purpose only, and without prejudice to the plaintiff in any other case, it is stipulated and agreed that at the time when the bill against the defendant was filed there were no such gross receipts from said business in its hands not already paid over.

Aug. 24, 1884.

S. BARTLETT,
Solicitor for Pl'ff.
F. A. BROOKS,
Solicitor for Def't.

231 *Decree.*

Circuit Court of the United States for the District of New Hampshire. May Term, 1884.

OGDENSBURG & LAKE CHAMPLAIN R. R. COMPANY
vs.
NASHUA & LOWELL R. R. CORPORATION.

This cause came on to be heard and was argued by counsel, and

it appearing by a stipulation between the parties filed therein, that at the time of the bringing of the plaintiff's bill there were in the hands of defendant no gross receipts from the business mentioned in the contract annexed to plaintiff's said bill, on consideration of the premises this court doth declare that under and by virtue of said contract the plaintiff would be enabled to claim against the defendant only the amount of said gross receipts, and the plaintiff
232 having agreed, as shown by the terms of said stipulation, that there were in the hands of the defendants when this bill was filed no such gross receipts, it is ordered and decreed that plaintiff's bill be dismissed with costs.

233 Circuit Court of the United States for the District of New Hampshire. May Term, 1884.

OGDENSBURG & LAKE CHAMPLAIN R. R. COMPANY
vs.
NASHUA & LOWELL R. R. CORPORATION.

And now on the third day of September, 1884, upon the entry of the final decree in said cause, dismissing the bill of complaint in said cause, the complainant prays in open court an appeal from said final decree to the United States Supreme Court, at the stated term thereof, to he held on the 2nd Monday of October, 1884, and that said appeal to be allowed by this court.

By S. BARTLETT,
Its Solicitor.

Memorandum.

It is agreed by the parties that an appeal in the foregoing
234 form be entered by the clerk, and that said appeal shall be deemed to have been taken in open court, as recited in said appeal.

S. BARTLETT,
Pl'ff Solicitor.
F. A. BROOKS,
Def't's Solicitor.

Whereupon the court, in pursuance of said prayer, on the same day, to wit, on the said third day of September, 1884, allowed the said appeal as prayed for by the complainant.

235 Know all men by these presents, that we, the Ogdensburg and Lake Champlain Railroad Company as principal and Henry A. Church, of Cohasset, in the State of Massachusetts, as surety, are held and firmly bound unto the Nashua and Lowell Railroad Company in the full and just sum of one thousand dollars, to be paid to the said Nashua and Lowell Railroad Company, its certain attorney, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, heirs, executors, and administers jointly and severally by these presents, Sealed with our seals, and dated the — day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the May term of the United States court, held within and for the district of New Hampshire, in a suit therein depending in said court between said Ogdensburg and Lake Champlain Railroad Company and said Nashua and Lowell Railroad Company, a decree was rendered against the said Ogdensburg and Lake Champlain Railroad Company, and the said Ogdensburg
236 and Lake Champlain Railroad Company having obtained an appeal in open court to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and admonishing said Ogdensburg and Lake Champlain Railroad Company to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said Ogdensburg and Lake Champlain Railroad Company shall prosecute its appeal to effect, and answer all damages and costs if he fails to make the plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

OGDENSBURG & LAKE CHAMPLAIN R. R. CO.,
By L. MILLS, *Pres't.* [SEAL.]
HENRY A. CHURCH. [SEAL.]

Signed, sealed, and delivered in presence of—
H. A. CHURCH,
As to Pres.

Approved. HORACE GRAY,
Associate Jus. Sup. Court of the United States.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of New Hampshire.

Attest: WILLIAM H. HACKETT,
Clerk C. C. U. S., District of N. H.

237 UNITED STATES OF AMERICA, *District of New Hampshire:*

I, William H. Hackett, clerk of the circuit court of the United States for the first circuit and district of New Hampshire, certify that the foregoing is a true copy of the record and of all proceedings in the cause of the Ogdensburg and Lake Champlain Railroad Company against the Nashua and Lowell Railroad Corporation of New Hampshire, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Portsmouth, in said district, this eighteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[SEAL] WILLIAM H. HACKETT, *Clerk.*

Endorsed on cover: New Hampshire C. C. U. S. No. 1009. The Ogdensburg and Lake Champlain Railroad Company, appellant, *vs.* The Nashua and Lowell Railroad Company. Filed 6th October, 1884.

112-311

Office Supreme Court U. S.
FILED.
OCT 28 1884
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

IN EQUITY.

No.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD CO.

vs.

NASHUA AND LOWELL RAILROAD COMPANY.

October Term, 1884.

Plaintiff's Brief.

The substantial controversy between the parties turns upon the construction and legal effect of a contract, dated February 24, 1871, annexed to the Bill. (Record, p. 6.)

To render the argument intelligible, a statement of the general purposes sought to be accomplished by its provisions is necessary to be made at the outset. An exact analysis of its important clauses will be hereafter requisite to determine their true construction.

At the date of the contract, the Ogdensburg, the Vermont and Canada, the Vermont Central, the Northern Railroad of New Hampshire, the Concord, the Nashua and Lowell, and the Boston and Lowell Railroads formed a connecting line between Boston and Ogdensburg, and the line depended largely for its business upon the regular transportation by steamers of freight and passengers between Ogdensburg and the West.

The Northern Transportation Company, an Ohio corporation, had been chartered to carry on such transportation, and its withdrawal was threatened, and from financial embarrassments ~~was it~~ it was unable to do it efficiently.

One year previous to the date of the contract, — viz., on the 24th day of February, 1870, — the Ogdensburg Railroad had been leased for the term of twenty years to the Vermont and Canada and the trustees

I.

It will be admitted, we think, on reference to the foregoing relations of the parties, when the contract was made, that unless there be found in it some distinct provision or some clear and inexorable implication that it was the purpose of the parties that the refunding of plaintiff's advances should be at the risk of the breaking up of the business at any moment, wilfully or otherwise, by either of the other parties, the law would imply an obligation of the third parties, at whose request, and for whose sole benefit those advances were made, to restore the same if the adventure should fail or be broken up before such restoration.

1st. What then are the provisions of the contract (preceding, and aside from the Sinking Fund Articles) which refer to plaintiff's advances and to the period when, by whom, and the mode in which those advances shall be repaid? They are contained in Article 2, record , p. 7, and are as follows: "And the party of the fourth part will, in case it "shall be necessary to secure the regular and efficient running of said "steamers to and from said Ogdensburg, when called upon by the parties "of the second part, advance, from time to time, sums not in all ex- "ceeding six hundred thousand dollars, to be used by said parties of "the second part for the same purposes as said semi-annual payments, "and *to be* pro tanto *in lieu thereof, and to be repaid out of said semi-* "*annual reservation*, as hereinafter provided, it being understood and "agreed that each of said parties of the third part shall be only liable "to reserve and advance or pay to the parties of the second part, *or to* "*the party of the fourth part, as the case may be*, its share of such "reservation, advance, or payment, to be ascertained by the proportion "which said gross receipts of each of said parties bears to the entire "amount of said gross receipts between Ogdensburg and points east- "ward, upon the roads owned, leased, or operated by any of said third "parties."

Now it is clear that these advances, thus to be made, were to be made for and on behalf of the third parties "*pro tanto* in lieu of" the several payments to be made by them out of their future gross receipts. It is equally clear that the repayment of those advances was to be made by the third parties directly to plaintiff, and not through the trustees, since the trustees had received and invested the same sums. Can it be said that the reference to the sources from which the third parties are to derive the means of repayment, or that the provision for the

proportions as between themselves of such repayment, import that plaintiff was to take the risk of there being any gross earnings out of which its advances thus made to, and in relief of those third parties, should be repaid?

If there was nothing else in the case, no other legally implied obligation of the third parties to repay plaintiff's advances, we submit that such advances, under such circumstances, import an agreement with the lender that such future semi-annual reservations shall exist and be made, and shall be adequate to repay the loan. Nothing but the clearest language, under such circumstances, would impose upon the lender the risk of the future existence of such reservations, or of their adequacy.

Indeed, it may be stated, we think, as a sound proposition, that an advance or loan made at the request and for the benefit of another, which he promises shall be repaid from funds expected by him to be derived from a designated source, if and when that expectation fails, becomes on such failure absolutely payable. Thus in the case of a loan to one who has contracted to erect structures for a "third party, and agreed to repay the loan out of moneys to be received under his contract," the insolvency of such third party, or any casualty which, without fault of the borrowing party, shall preclude the execution of the contract, does not discharge the loan.

2d. But, if this view be not correct, we submit that the article in question contains this clear agreement with the plaintiff, namely, that the semi-annual reservation, according to the provisions of the contract, *shall continue to be made during the whole or such part of the nineteen years as may be necessary by means thereof to repay plaintiff's loan.* So that if plaintiff put his loan at risk at all, which we deny, it could only be the risk that the amount of the semi-annual reservations applicable to its repayment *during the whole nineteen* years would prove inadequate to its reimbursement.

Thus the preliminary recital declares (Record p 6) that the purpose of all the parties is that the payments of the third parties from their gross receipts, as well as the advance of $600,000 by the plaintiff, shall be made "to secure the most regular, efficient, and *permanent* service by steamers for the term of nineteen years."

The agreement of the third parties (Record p 7) is that "*during the said term*" they will reserve and pay, each half year, an agreed proportion of their gross receipts; and that, in case plaintiff shall make the loan of $600,000, it is "to be repaid out of said semi-annual reservations,"

during that term. Clearly these are agreements, with the lender at least, that the semi-annual reservations and payments of the third parties (although they may prove in the end insufficient) *shall continue to be made during the whole term.*

As will be shown hereafter, the final clause of Article 7th contemplates the same thing; so that unless there be found elsewhere in the contract a distinct provision that, should the Transportation Company, despite the aid thus to be furnished it, fail, or abrogate its contract, then these agreements are to be repealed, and the plaintiff lose the amount of his loan, these agreements do bind the third parties to continue to make their semi-annual payments, out of which the loan of plaintiff is to be repaid during the whole term, *and thus that the term shall endure.*

Let it not be said that the third parties would be naturally unwilling to agree with the plaintiff that the Transportation Company would keep its covenant. *The whole arrangement and scheme was that by the means provided the third parties should secure the ownership or control of the stock of said party of the first part—the Transportation Company* (Record p. 6). Unless this were done the plan must necessarily be abandoned. Was the plaintiff to take the risk of success of these third parties in securing such ownership, or did those for whose sole benefit the arrangement was made take that risk? The answer would seem to be plain. The agreement, therefore, of the third parties that the business should continue during the term was an agreement by parties who, as it is assumed by the contract, were to obtain the control of the Steamboat Company, and thereby execute its contract. It was only when it should be found that this could be accomplished that plaintiff's advance was to be made. Indeed, we think the contract of the Steamboat Company (Article 1st, p. 7) when carefully analyzed is a covenant solely with the third parties, who by its terms were to supervise its execution, and who alone could know and vindicate any breaches thereof.

II.

Before going to the Sinking Fund Article, which, as has been stated, modifies the contract, it may be well to find if there be not in that or the other articles some provision by which, if the Transportation Company should fail and break up the business, the obligations of the third parties to the plaintiffs should cease, and its loan be lost.

We repeat, that such provision must be clear and distinct, and not merely a strained inference that, because the enterprise *might* fail, the parties must have contemplated that such failure would involve an absolute loss to parties who, not interested in that enterprise, had loaned money in advance, and as a substitute for sums agreed to be paid by parties who alone had such interest.

(1.) It is certain that in no part of the contract is there any reference to the breaking up of the business, or the dissolution of the contract by the event which has actually occurred, and which did break up the business, namely, the failure of the Transportation Company.

(2.) There is, however, in one of the articles (Article 3, page 8) a *provision as to the sale and application of the proceeds of the property purchased* and held by the trustees in the event that the sums advanced by plaintiff, and *those paid by the third parties, should on or before the expiration of the nineteen years have remained unpaid*, namely, that the proceeds of such sale were thereupon "to be divided among the parties entitled thereto." This provision is also extended to "the case of failure of either of the third parties to perform the stipulations of their agreement." But it does not declare that this mere appropriation of the proceeds of property held as security is to put an end to the contract, or to the duty of the third parties to continue their semi-annual payments; nor is it inconsistent therewith.

But if this be obscure, that obscurity is removed by the next paragraph of the same section, in regard to the provisions of the 5th Section (which contains the detailed provisions as to the formation of a Sinking Fund, by means of which plaintiff's advance and interest were expected to be repaid); and this paragraph declares that if the parties of the third part fail to pay plaintiff its semi-annual interest, and also fail to make the semi-annual payments to the Sinking Fund (which are substituted for the payment originally required to be made to the trustees), not that the contract is to be broken up, but that the parties of the second part, trustees, shall apply all (future) dividends and income which they may receive from the trust property directly to payment to the plaintiff and to the trustees of the Sinking Fund, *and that these payments shall be pro tanto in place of said semi-annual payments*, as to which said parties are in default, thus clearly contemplating the continuance of the enterprise.

3d. There is also a provision near the close of Article 7 (Record , p. 10), (which article will be hereafter reproduced, and be the

subject of careful discussion), which distinctly provides that, "in case of default by the parties of third part to make said payment to the Sinking Fund," not that the contract shall be at an end and be wound up, but that the trustess of the Sinking Fund shall collect the debts held therein, and *pay the interest* due the Plaintiff, and not that the contract should be terminated. Probably the default referred to was that of dilatoriness in payment, since otherwise it is difficult to see how the contract could be carried out.

Neither the Third Article, therefore, nor either of the other articles do, we submit, in terms or by implication, provide for the breaking up of the business and contract, even by the parties of the third part,—certainly not by the bankruptcy of the Transportation Company,—nor that thereupon plaintiff's loan should be lost. But if by just construction the Third Article looks to the final breaking up of the business by the conduct of any one or more of the third parties, although this is not the event which has happened, yet it is fit to point out, that, if such be its construction, there is nothing in the article which implies that payment to plaintiff by the trustees of its share of the property held as collateral security is to be taken as a full discharge of its loan. *That loan might, at the time when this provision should go into operation, have been made to the full amount of the* $600,000*; and yet up to that period the semi-annual contributions of the third parties might have been very trifling*, and wholly inadequate to repay the sums advanced by plaintiff in lieu of the semi-annual contributions which were to be made by these third parties. It would seem impossible, if, on the occurrence of the event thus provided for, it was designed by the parties that plaintiff should lose the whole or the balance of its loan, that a declaration of such purpose should not have been added, or that so grave a matter was left to implication.

Not a word is said as to how the plaintiff, with its advance (it may be of $600,000), is in this event to be left. *Can it be a just construction which leaves it in the power of either of the third parties at any time, by refusing to pay over its gross receipts, to annihilate all claim of plaintiff to reimbursement* of its advances (except from its aliquot part of the assets, consisting of bonds and stocks that may have been purchased by the trustees to insure the success of defendant's business)? Can this consequence follow without some distinct declaration of that fact, to which plaintiff shall be held to have assented?

III.

If, as plaintiff contends, it is clear that there is nothing in the contract which provides for the breaking up of the business, nor that by implication the plaintiff's advances were to be made at the risk of such an event, it is hardly necessary to add, that there does not exist in any of the articles aught that repeals or modifies the implied agreement of the third parties with the plaintiff that the semi-annual payments to be made by them should continue to be made during the entire term, so that the aggregate of the gross receipts of the third parties during the nineteen years should form a fund from or by which the repayment of plaintiff's loan was to be made or secured.

There is to be found at the end of Article 7 a clause in regard to the disposition *at the end of the term* of the Sinking Fund (made up of the semi-annual payments by the third parties, under the provisions of Article 5), which clause is as follows: "All of said Sinking Fund shall "eventually, at the end of said term, be applied to pay all advances "made by the party of the fourth part; and, if any balance shall remain, "the same shall be divided among the parties of the third part in such "proportions as they shall be entitled to; and, if said Sinking Fund "shall prove insufficient, the parties of the third part shall make up "the deficiency out of gross receipts from said business brought by "steamers, as aforesaid." Record p 10 .

Now this clause, it has been contended, limits the liabilities of the third parties to their *ultimate* gross receipts (a point which will be discussed hereafter); *but it surely cannot be deemed a waiver of the covenant of the third parties to make during the whole term their semi-annual payments* from those gross receipts, and to that extent secure the loan of the plaintiffs. Indeed, the clause is founded wholly on the assumption that these payments have been made by the parties to the end of the term.

The contention of plaintiff, therefore, as to the implied covenant of defendants, that the semi-annual payments should be made throughout the term, ultimately rests on this question: There being no provision in the contract for breaking up the business, and the defendants having in clear terms covenanted to pay semi-annually, from their future gross receipts, during the whole term, sums to be applied in reimbursement of plaintiff's loan, made in relief of the third parties, and without any qualification of that covenant, or making it dependent

on future events, does the law put upon them the risk of future events which prevent them performing their covenants? We submit that not only is such the legal effect of the contract, but that it is the equitable result as affecting a loan made as their loan was made.

IV.

The answer to the foregoing grounds on which plaintiff thus far has rested its claim is, as disclosed by the defendant's pleadings, that throughout the contract the extent of the liability of each defendant is limited to a defined proportion of its gross receipts, and that this limitation applies to all events, and under all circumstances. But this is most clearly erroneous. *Those limitations will be found in each instance to have nothing to do with the contingency that the business shall be broken up by the acts or omissions of either of the third parties or of the Transportation Company.* They are in each and all instances qualifications of the defendant's liabilities *upon the assumption that the contract is in the course of successful execution*, and they merely define the extent to which defendants shall each contribute to that success. There are only two exceptions; namely, Article 6th and Article 7th, which provide, *not for the breaking up of the business, but for the duties of the third parties, as between themselves, at the expiration of the entire term.* The effect of the provision in one of them (Article 7th) as to the liabilities of the parties to make up the Sinking Fund, and the sources they were to use, will be discussed under a subsequent head. For our present contention it is sufficient to note that *they have no reference to the duties or obligations of the third parties in the event that the business should stop in medias res.*

We submit, then, that the ground of defendants, that the contract limits their liability to a defined portion of their gross receipts under all circumstances, is erroneous, and that those limitations are only applicable in case the business is being successfully conducted.

Hitherto it has been the purpose of the plaintiff to show that if it shall be held that the Sinking Fund articles of the contract — disclosing, as they do, a new state of facts inconsistent with the other provisions of the contract, and impairing plaintiff's security, and diminishing the rate of interest to be paid it—are not to be considered as containing an absolute covenant that a Sinking Fund shall be created adequate to repay plaintiff's advances,— a point to be hereafter carefully discussed,— yet that the implied covenant of the third parties

to repay the advances made by plaintiff in relief of the sums agreed by those parties to be paid from their future gross receipts, or the clear implied agreement of those third parties that the business should continue to the end of the term, supports plaintiff's bill and entitles it to a decree.

V.

It will be noticed in the scrutiny now to be made of the Sinking Fund articles that they do not change or abrogate the above covenant, that the business shall continue during the whole term; but they assume and declare that the semi-annual payments of the third parties are to be continued during the nineteen years, and this covenant is left unimpaired throughout.

These Sinking Fund covenants are next to be adverted to, and the principal provision is in Article 5 (Record , p. 9), namely, "that "in no case shall the semi-annual payments to be made to a (the) "Sinking Fund be less than amounts which, invested at six per cent. "per annum, will produce the sum to be paid out of such Sinking "Fund." We reproduce the whole article, which is as follows:—

ARTICLE FIFTH.—"That in case the party of the fourth party "shall advance any sum or sums amounting to six hundred thousand "dollars, or any part thereof, under this agreement, then the parties "of the third part are to pay to the party of the fourth part so much "of said semi-annual payments reserved from gross receipts, as afore-"said, as will pay the semi-annual interest on said sum or sums so "advanced by the party of the fourth part, at the rate of eight per "cent. per annum; and shall pay to the persons who may for the time "being hold the offices of president and treasurer of the Boston and "Lowell Railroad Corporation and of the Ogdensburg and Lake "Champlain Railroad Company, as trustees, such sums semi-annually "as will, in the judgment from time to time of said two presidents and "treasurers for the time being, when invested as a Sinking Fund, pay "all excess of the advances of the party of the fourth part over five "hundred thousand dollars, within two years from the date hereof, and "the remainder of the principal of said advances on or before the "expiration of said term of nineteen years, and also such further sum "semi-annually as will, when invested as a Sinking Fund, in the judg-"ment of said two presidents and treasurers, as aforesaid, purchase the "existing mortgage bonds of the party of the first part, amounting to "four hundred thousand dollars, within ten years from the date hereof,

"which bonds so purchased shall be held by said trustees of the Sink-"ing Fund for the security of the parties hereto, as if held under "Article Seventh of this agreement; and that said semi-annual pay-"ments are to be made to the party of the fourth part and to said "trustees of said Sinking Fund in place of advances to the same "amounts to the parties of the second part, as hereinbefore provided, "and are to be ultimately repaid to the parties of the third part out "of the dividends, income, and securities purchased or otherwise "acquired by the parties of the second part, as herein provided, "whether the same shall be held by them or transferred to the trustees "of said Sinking Fund. *In no case shall payments to a (the) Sinking "Fund be less than amounts which invested at six per cent. per annum "will produce the sum to be paid out of such Sinking Fund.*"

It will be perceived that by this Article the covenant of the third parties contained in the previous Articles, limiting their several payments to the $150,000, semi-annually, *is modified so as to enlarge and make those semi-annual payments sufficient, when invested, not only for the original purpose set forth in Article 3, but also an additional sum sufficient to purchase $400,000 of the Transportation Company's bonds within ten years.* But it still remains as before an absolute covenant to make these semi-annual payments thus enlarged *throughout the whole term.*

We now submit that this Article contains *a further absolute covenant by the defendants designed to strengthen the preceding covenant* (which required that the semi-annual payments should be continued throughout the term, but which payments might at the end of that term be in the aggregate insufficient to reimburse the plaintiff), by which absolute covenant it is declared that "in no case" shall the sums paid by the third parties to the Sinking Fund be less than such as invested in the manner provided in the Article shall produce the sums for which the Sinking Fund was instituted, and from which plaintiff's loan was to be repaid in full. And we submit further, that this absolute covenant grew out of and was founded on the fact that plaintiff's security was weakened by the provisions of Article 5, as compared with its original security under the previous Articles, and its rate of interest cut down.

It will be seen that Article 5 provides, by its earliest clause, that the payments to the Sinking Fund shall be from the "semi-annual "payments reserved from gross receipts, as aforesaid," that is to say, from the semi-annual maximum of $150,000. As will be shown here-

after, the sum thus semi-annually to be paid to the Sinking Fund out of the $150,000 was only $46,500. And it further states that these payments to the Sinking Fund are to be "in lieu of ad-"vances to the same amount to the parties of the second part (Trustees)." But in view of the fact that the previously limited semi-annual payments might not be adequate to the new and added purchase of the $400,000 Bonds, the final clause was added, "that in no case" shall the payment to the Sinking Fund be less than will create a fund which, invested at 6 per cent., shall be equal to the whole amount to be paid from that fund. Does this language mean what it says? On this question we submit,—

(*a*) — That the covenant "*in no case*," etc., is in its terms clear and absolute, and, as applied to the subject-matter, results in no obscurity, and so far as plaintiff can see, looking to the whole contract, is incapable of any other than its obvious interpretation. Indeed, neither in the argument of counsel, nor in the judgment of the Court, at the hearing below, was any other interpretation of the words suggested.

(*b*) — That the contract on its face furnishes a natural and obvious reason for adding to the previous covenants of the defendants an absolute covenant of this character.

(*c*) — That the detailed provisions of Article 5, as to the mode of creating this Sinking Fund, are inconsistent with any other construction than that the payments of the third parties were to be of such *fixed sums*, that in no case could that Sinking Fund (unless by loss in its investments) be inadequate; and, finally, what is more material, *that in carrying into effect the details of said Sinking Fund, both parties have so construed the same, and acted for years, in conformity to that construction*,—namely, that the Sinking Fund in no case should (except by loss in its investments), be inadequate to pay the full sum for which it was created.

(*d*) — That the provisions at the end of Article 7, that, if said Sinking Fund shall prove insufficient, the parties of the third part shall make up their deficiency out of their gross receipts, is in no wise repugnant to an absolute covenant that the semi-annual payments of the third parties from time to time should, *when made*, in no case be less than sufficient to satisfy the entire sums payable therefrom; but that that provision has regard and applies only to the case of the insufficiency of the Sinking Fund by reason of possible losses by its investment in the bonds and securities of the Transportation Company

during the nineteen years, — a loss not in the least degree improbable, looking to the acknowledged condition of that Company at the date of the contract.

1st. — The first of these contentions needs neither authority nor argument. Unless there be found elsewhere some qualification or modification, or some repugnancy of this absolute covenant to the other parts of the contract, the words must, upon common principles of construction, be held to mean what they clearly express.

2d. — The suggestion that there existed a probable reason for such absolute covenant rests upon the fact, that the enlarged semi-annual payments out of the gross receipts required by Article 5 in order to accomplish a further purchase, — namely, the $400,000 Transportation Company's bonds (which purchase was not included in the provisions of Article 3), — weaken the security of the plaintiff *to whose reimbursements those gross receipts had alone been previously pledged.* And further, by Article 5, *the rate of interest on plaintiff's loan was reduced from ten per cent. (as provided in Article 3), to eight per cent.*

3. — The third of the foregoing positions, — namely, *that no Sinking Fund could be formed, pursuant to its provisions, which should limit the semi-annual payments of the third parties to the fluctuating amount of their gross receipts,* or *which did not require of those parties severally the payment of absolute sums which would, invested at six per cent., provide at the several periods when payments were to be made therefrom the amount of those payments.*

The sums to be fixed were such as would, from time to time, pay all the prescribed sums at fixed dates. Not that they are to be *fixed* from time to time, since it would be impossible to fix the amounts to be paid without a survey of the whole field at the outset, or without reference to the facts that all plaintiff's loan over $500,000 was to be paid within two years, the residue of that loan on or before the expiration of nineteen years, and the purchase of the $400,000 bonds within ten years.

How could such a Sinking Fund be created, if it were limited to the gross receipts of the parties of the third part? How could the trustees fix, as they were required to do and did, the *exact payments* to be made semi-annually to the Sinking Fund by the parties of the third part, if the payments of those parties were intended to be limited to a portion or the whole of the gross receipts of those parties, which might prove wholly inadequate? and how could they be made semi-annually if in any year the gross receipts of *either of the parties* were inadequate to the sums fixed?

We submit that this required Sinking Fund could only be shaped in reference to certain *fixed* sums at the outset, which when paid semi-annually, and assuming them to be invested at 6 per cent., would "in no case," (unless impaired by losses in investment) be inadequate to the required payments therefrom; but that it could not be shaped or based upon the fluctuating semi-annual gross receipts of the respective parties.

4th. — *And finally and what would seem conclusive, all the parties acting upon this view framed the Sinking Fund at the outset so as to require absolute payments irrespective of the gross receipts; and all the third parties made the payments in conformity thereto (until the business was broken up).* See Deposition of Henry A. Church, Record pp 88-92

The Sinking Fund, as shown by Article 5, was to be framed so as to pay plaintiff $100,000, out of the $600,000 bonds advanced by it, within two years; that is to say, "on or before February 24, 1873," and the remainder "on or before *the expiration of said term of nineteen years.*" It was next to provide for the purchase of $400,000 of the Mortgage Bonds of the Transportation Company "within ten years."

The mode in which the Sinking Fund was actually made up and *acted upon for years* is shown by two exhibits, A W W, and B W W, annexed to Church's deposition (Record pp 91-92). The contributions to the Sinking Fund to pay plaintiff's $100,000, due within two years, are fixed at $24,000. That to make the purchase of the $400,000 Transportation Company's Bonds within ten years is fixed at $15,000. The sum necessary to pay the remaining $500,000, due plaintiff, on its advance of bonds, is fixed at $7,500, making an aggregate of $46,500. This whole sum is required for the first two years until Plaintiff's $100,000 should be paid off. After that, the sums of $15,000, and $75,000, aggregating $22,500, alone were required, and exhibit B shows that these sums were paid to the trustees, semi-annually, until September 1st, 1874. These sums, it is shown by the deposition of Mr. Church, were, for years, paid by the third parties, and the answer of defendant (Record p 23 and Exhibit C, Record p 31) shows that *of these sums defendant paid in* $3,295.13.

VI.

It is next proper to refer to the judgment of the learned Circuit Court, which, in effect, declared *on demurrer* that, "although it was difficult to see how plaintiff could make such a contract," yet, by its legal construction, "the whole gross receipts from the business which ac-

"crued to defendant are pledged to complainant; but that no payment "can be demanded beyond the amount of these receipts."

We append hereto the judgment of that Court.

Before pointing out the plaintiff's view as to the correctness of the grounds on which that judgment was rested, it is important to note that the case was presented on demurrer only. That at the final hearing the Court (differently constituted) declined, from reasons of convenience or propriety, to discuss or overrule the decision made on demurrer; and that the important fact not developed by that demurrer, namely, that the parties had at the outset given a practical construction to the provision in relation to an adequate Sinking Fund, and acted upon it for years, was only disclosed upon the subsequent taking the evidence in the cause.

That portion of the judgment which displays the ground on which it is rested is as follows: —

"It may be difficult to see why plaintiff should have made such "a contract, but we must take it as it is. It seems to us that the "parties of the *third part* were willing to rely upon the security which "would be furnished by buying up the bonds, stock, and debts of the "Transportation Company; *and that the plaintiff trusted to that and "the pledge of the gross earnings of the business. The agreement for "securing the plaintiff seems to us to be summed up in the concluding "part of Article 7, that, 'if such Sinking Fund shall prove insufficient,* "'the parties of the third part shall make up the deficiency out of the "'gross receipts from said business brought by the steamers as afore-"'said.'"

It is thus obvious, that, having to construe the covenant in Article 5, that in no case shall the payments of the third parties to the Sinking Fund be less than the amount necessary to produce the sums required to be paid out of it, the above provision of Article 7, that, if the Sinking Fund should prove insufficient, the third parties shall make up the deficiency, was thought by the Court inconsistent with the construction of Article 5 as being an absolute covenant that the payments of the third parties should in no case allow such deficiency; and in this supposed conflict of provisions (but without defining what the provisions of Article 5 could mean), it held that the plaintiff must be deemed to have trusted to the pledge of the bonds, stock, and debts of the Transportation Company, and to the covenant of the third parties at the end of Article 7, as to making up the deficiency of the Sinking Fund out of gross receipts; so that, if it were shown that there

was nothing remaining in the hands either of the second parties or of the trustees of the Sinking Fund, the plaintiff's right would be limited to an account of those gross earnings.

In view of this construction of Article 7, we reproduce the whole Article, which is as follows: —

ARTICLE SEVENTH. "That it shall be the duty of the parties of "the second part, if practicable, to procure an extension of the time "of payment of the mortgage bonds of the party of the first part which "shall not have been purchased for the Sinking Fund, for five years "from the date of maturity; but if it shall be necessary, in order to "secure the running of said steamers as aforesaid, for the parties of the "second part to use any of the funds advanced to them as aforesaid, to "purchase or otherwise acquire any debts due from said party of the "first part, whether secured by mortgage or not, said parties of the "second part shall forthwith assign and transfer all said debts and "all evidences thereof and all securities therefor to the persons who "may for the time being be trustees of said Sinking Fund, to be held "by them in trust: first, to secure the repayment of all advances or "loans made under this agreement by the party of the fourth part, and "after the full payment of said advances or loans with interest as "aforesaid, to the party of the fourth part, to secure the repayment of "all sums paid, advanced, or lent under this agreement by the parties "of the third part, with interest as aforesaid; and that as long as the "semi-annual payments of interests shall be duly made by the parties "of the third part to the party of the fourth part, and the semi-annual "payment to the Sinking Fund, as provided in the fifth article of this "agreement, said trustees may extend by renewals or otherwise the "payment of both the principal and interest of said debts of said party "of the first part, at their discretion, for a period not exceeding ten "years from the date hereof; but in case of default by the parties of the "third part to make said payments of interest and to the Sinking Fund, "as provided in Article Fifth, said trustees of said Sinking Fund shall "forthwith, if requested in writing by the party of the fourth part, "proceed to collect said debts, and out of the sums collected pay from "time to time said semi-annual interest, as provided in Article Fifth, to "the party of the fourth part, and hold the balance, if any, as a part "of said Sinking Fund; *and that all of said Sinking Fund shall finally, "at the end of said term, be applied to pay all advances made by the party "of the fourth part, and if any balance shall remain, the same shall be "divided among the parties of the third part, in such proportions as they*

"*shall be entitled to; and, if said Sinking Fund shall prove insufficient,*
"*the parties of the third part shall make up the deficiency out of gross*
"*receipts from said business, brought by steamers as aforesaid.*"

1. The first suggestion of plaintiff in regard to this article, and as to its provision for supplying a deficiency of the Sinking Fund, is, that *it is to take effect* "*at the end of said term;*" so that whatever may be its construction in other respects, it not only leaves uncontrolled the clearly implied agreement of the third parties that the semi-annual payments to the Sinking Fund should continue during the nineteen years, *but it also assumes, and is wholly founded on the assumption, that those payments have been made.*

2. The view of the Court proceeds on the ground that the final clause of this article is to be construed as meaning, that, if the semi-annual contributions to be made to the Sinking Fund during the whole term shall to any extent *fail to be so made*, and *thus* the Sinking Fund prove to be insufficient, all the parties will *then* make up what, by the previous covenants, the parties had agreed to do severally during the term; and that they will do this out of the whole amount of all their gross earnings, instead of limiting the same to the relative amounts prescribed by their previous covenants.

Now, it must be admitted, that if the third parties thus agreed at the end of the term *to supply each other's defaults* in their several payments to the Sinking Fund, and that they should not be supplied absolutely, but only to the extent of their gross receipts, and if it be held that plaintiff assented and was content to take such security, and assume the risk of the semi-annual payments being made good only from the source thus defined, then the judgment of the Court as to the effect of the securing absolute covenant in Article 5 would seem to be correct.

3. But plaintiff submits that the true construction and intent of the clause at the end of the Seventh Article (which provides that *at the end of the term*, if the Sinking Fund shall prove insufficient, the parties of the third part are to make up that deficiency out of the gross receipts) is that *it applies only to the case of the insufficiency of the Sinking Fund at the end of the term, by reason of losses arising from its investments*, embracing as they do the stock and securities of the Transportation Company, a Company admitted to be embarrassed and hitherto unsuccessful in the enterprise which it was proposed to continue.

This deficiency which the Article refers to is a deficiency to be

found at the *end of the term*. If that deficiency was in any way intended for a deficiency in the amount of the semi-annual payments to be made from time to time *during the term*, from want of gross receipts of the third parties, that would be a deficiency which would surely defeat all certainty that the required payments from the Sinking Fund would be made in their prescribed order of time, if at all. Indeed, it would have an effect to defeat or put an end to the scheme. It can therefore hardly be held that the equal or unequal ability of the third parties out of their gross receipts to make their payments was meant by the words, "*prove* insufficient," and that the deficiency of some of those parties was to be made up at the end of the term from the gross receipts of all.

The other construction, namely, that the clause refers to the deficiencies of the Sinking Fund at the end of the nineteen years, by reason of the partial or total failure to realize sufficient out of the bonds and securities, in which the fund was required to be invested, is the natural and reasonable interpretation, looking to the circumstances.

We submit, then, that the purpose of the clause was, in case the Sinking Fund should "*prove*" to be impaired by losses at the end of the term, that the third parties (having already covenanted to create a Sinking Fund adequate, if invested at six per cent., to repay among other things the loan of plaintiff,) superadded an agreement founded on the character of the investment in which that Sinking Fund was required to be made, that if it should in the end have been impaired by losses, they would make the same good out of their gross receipts; so that having once paid in the full sum necessary to a complete Sinking Fund, the third parties further agreed, that, if that Sinking Fund should be impaired, they would make it good to the extent of their gross receipts.

4. But it may be suggested that an agreement to make good at the end of the term the losses of the Sinking Fund out of these gross receipts imparts a new qualification to the liability of the third parties, namely, that such liability at the end of the term shall be limited to the gross receipts, and that this is inconsistent with the absolute covenant of Article 5.

Now, if the liability sought to be enforced in this case was the liability to make good at the end of the term the losses sustained by the Sinking Fund, instead of the liability for not having kept the covenant to semi-annually make the prescribed payments during the whole term, so as to constitute said Sinking Fund, then the true construction of this final clause would require careful consideration.

Let us assume that the third parties had, down to the end of the term, regularly made their specified payments to the Sinking Fund. If so, then their obligation under the covenant in the Ffth Article would have been fully discharged. They would have paid the sums fixed by agreement, and *made mathematically certain*, so that in no case could the sums paid in be inadequate to the purposes of the fund (as required by Article 5). But plaintiff who was to make this forced loan might well suggest the possible event that the investments to the Sinking Fund, though thus fully constituted, might, from the character of its investments, be impaired at the end of the term. From this, no doubt, arose the superadded covenant of the third parties that they would make the Sinking Fund good out of their gross earnings. And such we think is clearly the intent and construction of the Article.

It may be added that the true construction of the clause *is not that the contribution should be limited to gross receipts* Gross receipts are referred to as fixing the *proportions* of contribution. Any other construction would omit all reference to proportions, and leave the several parties subject to great and unjust inequalities in making up the Sinking Fund.

VI.

It has been suggested that the contract provides for securing the plaintiff's advances in other ways, aside from the Sinking Fund, and hence that the construction of Article 5, as containing an absolute covenant to contribute during the whole term to the Sinking Fund sums sufficient to repay plaintiff's advances, would be unnatural and unnecessary if these other provisions were effective. Article 7 has been referred to as containing such additional provisions.

This contention assumes those other provisions to be *certain*, adequate, and complete, and subject to no contingencies; since, if they provide merely for partial and contingent further security, they form no reason why the third parties, to make certain the repayment of the loan, should not add to plaintiff's security by making such additional provisions. Again, although the Sinking Fund should have been made up and completed, yet, as has been seen, its condition at the end of the term, looking to the class of securities in which it was to be invested, was by no means certain,—any provision therefore for additional security is not repugnant to the Sinking Fund covenant.

But the true answer to the suggestion is that, although the contract is loosely drawn, it is clear that the provisions in Article 5, and those

which follow relating to the Sinking Fund, constituted an entirely new plan or scheme,—one that disregarded all previous stipulations. Thus as to plaintiff's advances, it altered and enlarged the uses to which those advances were originally applicable. The rate of interest originally payable to plaintiff is altered. The parties by whom that interest was to be paid are changed, and the gross receipts are diverted from the parties of the second part (to whom the same were originally payable) (to the extent which was necessary to form a Sinking Fund), and made payable to new parties, namely, to the trustees of the Sinking Fund, and, it is submitted, these alterations clearly thereafter confined plaintiff's security to that Sinking Fund. It will be seen that the provisions of Article 7, which are thus referred to, are provisions merely and wholly confined to providing for a contingent purchase of the debts of the Transportation Company, and for the disposition of such purchases; by which disposition the Sinking Fund would, if the event occurred, be strengthened, and the third parties also secured.

In substance, Article 7 provides that *in the contingency* that to secure the running of the steamers it should be necessary to purchase the *debts* of the Transportation Company, whether secured by mortgage or not, which purchase had been excluded by the preliminary recital, Record p. 6 and by Article 3, Record p. 8, the parties of the second part might make such purchases, and assign the same when made to the trustees of the Sinking Fund to stand as security for plaintiff's advances, and next as security for the third parties. It further provided that, if the third parties should fail to pay plaintiff's semi-annual interest, which under the new scheme they were bound to pay, and not the second parties, or failed to make the regular payments to the Sinking Fund, then the trustees of the Sinking Fund are to collect the debts thus purchased, and to pay therefrom the *interest only* due the plaintiff, and, without breaking up the contract, put the residue into the Sinking Fund.

It is submitted, therefore, that this possible contingent strengthening of the Sinking Fund (which, though the payments thereto had been regularly made, up to the end of the nineteen years, in the significant term of Article 7th, might *prove* insufficient) is in no way repugnant to the absolute covenant that those payments should be made to the Sinking Fund throughout the term.

VII.

Plaintiff has thus far submitted, that by just construction of the contract (influenced as that construction must be by the fact that the loan of plaintiff was made without any interest, pecuniary or otherwise, in the enterprise) there is contained in it covenants that, during the whole contemplated period of its existence, there should be paid by the third parties semi-annual sums, which were intended by both should furnish a fund in the aggregate as security to the plaintiff for its reimbursements, and that the possible breaking up of the business by the acts or omissions of either of the parties was at the risk of those for whose benefit the loan was made who had thus covenanted.

We now add to this a fact drawn out by the testimony offered by defendants, namely, that in the preliminary negotiations the third parties procured their counsel to address a letter to the president of the plaintiff corporation, designed to overcome the agreed reluctance of the plaintiff to make the loan, and holding up to view in general terms, but not with distinctness, some undefined consequences which might result from plaintiff's refusal; which letter distinctly declares, not that the loan was to be in any way at the risk of the adventure, but that plaintiff was to *issue its bonds upon proper security*, and this "for the purpose of retaining and securing the business contemplated under said contract." (See Letter of J. G. Abbott and J. H. George copied in deposition of John C. Pratt, interrogatories 34, 35, 36, Record pages 111–112

VIII.

It remains to consider the question whether,—assuming the previous contentions of plaintiff to be sound as to its rights of reimbursement, yet it being now impossible by reason of the final abandonment of the business and contract to determine what would have been the gross receipts of all the third parties, at the end of the term, whether they would have equalled the plaintiff's loan, nor what would have been the relative gross receipts of each of the third parties at that period,—is the plaintiff remediless in the premises?

We suppose it to be free from doubt that this liability of the third parties is several; that the loan made by plaintiff was a substitute for the several sums to be in the future paid by those parties, and was to be reimbursed, not by any one of those parties if the others failed, but by each of them in proportion to its promised contribution to the fund.

Such has been held to be the legal effect of the covenants by Justices Clifford and Lowell. (Federal Reporter, Vol. 4, p. 64.)

We further assume it to be true that, if plaintiff is entitled to recover by virtue of the obligation arising from its advance thus made in lieu or relief of the third parties, or upon the express covenant of those parties that there should be made by them semi-annual contributions to the fund during the whole term, yet, that on a breach of that covenant, no one of the third parties is liable for the whole amount, but each only for what the law will fix as his due proportion.

As between plaintiff and those third parties, we submit that the law will, under the circumstances, assume (what those third parties are shown to have expected would be the result, viz.) that these aggregate gross receipts of the third parties would at the end have been more than sufficient to pay the instalments of the Sinking Fund, and thus reimburse plaintiff's advances, secured as they were in the manner hereinbefore pointed out.

As to what would have been the relative portions of the gross receipts of the several parties of the third part, had the business continued to the end. If it can now be ascertained what were their past relative gross receipts up to the period when the business was broken up (in violation of their agreement, in the faith of which plaintiff made its advances), it may be that, on the presumption that the future relative gross receipts of each of the third parties would continue the same throughout the term, this would furnish an equitable rule for apportioning the liabilities of the parties.

Plaintiff fears, however, that from lapse of time or loss of documents this will become impracticable. It is shown by the deposition of defendant's witness, Mr. Mellen, (who with Mr. Wilbur was by stipulation, Record , p. 76, appointed to make up the accounts (Record , p. 177 in answer to interrogatory 3), that, with all the aid furnished as described in that answer, and with all the time taken, as shown by his answer to the fifth interrogatory (p 177), he and Mr. Wilbur were able only to arrive *approximately* at the result. It should perhaps be added that the auditors failed to agree in the results, except to a certain extent, and thus their labors became fruitless. (See their Reports Record , pp. 77-81

If such shall be found to be the abortive result of an attempt to find the relative past gross receipts of the third parties, whose clear duty it was under the contract to keep the accounts in order to discharge their respective obligations (no such duty or power resting on the plaintiff),

it is submitted that the result must be that each of the third parties shall be charged, and be made to contribute equally to the repayment of the unpaid balance of the plaintiff's advances.

If the foregoing views of Plaintiff as to the construction of the contract shall be sustained, it will remain to show, if may be, that as to the allegations of fact made in the Bill, and not admitted but traversed by the answer, the proofs support the Bill, and that the matters of avoidance set up in the answers are not proved, or if proved constitute no legal defence. If the Court shall hold that each of the defendants is severally liable to pay its one-fourth part of the unpaid balance of plaintiff's loan, then the decree will be entered in conformity thereto. If, however, it shall be held that each of the parties of the third part is severally to contribute to the payment of that balance in the proportion that its *former* gross receipts bear to the aggregate gross receipts of all, then the case must be sent to a Master. This is an inquiry which "the Court will not allow the "parties to enter into except before a Master," since it may result "in "an immense mass of evidence relating to the particulars of an ac- "count, into the consideration of which the Judge cannot enter at the "hearing."

See Gresley, Equity Evidence (Am. Ed., 1837, pp. 168-169).

2 Daniels, Ch. P. (3d Am. Ed., p. 854).

The Bill prays that such an account may be taken under the direction of the Court.

I.

The Nashua & Lowell Company (Record , p. 44) asserts that the Northern Railroad Company and the Lowell Company, the Trustees and Managers of the Vermont Central and Vermont & Canada *in* 1871, namely, J. G. Smith, W. C. Smith, L. Barnes, and Benjamin P. Cheney, ought to be made defendants in its case.

The Record shows an amendment making George Stark (the only citizen of New Hampshire named in the contract) party defendant, and contains the answer of Stark.

This objection was made at the outset under the demurrer filed by the defendant. It was overruled by this Court on the ground that the covenants of the defendants were several and not joint, and consequently required no such joinder. It is needless therefore to refer to the Acts of the legislatures creating the several defendants, and authorizing the union of two of them, to find of what States they were citizens.

II.

As to the allegation of the Bill that the amounts of the several payments to the Sinking Fund were duly fixed and determined in accordance with the contract, the answer to the Nashua and Lowell Company states that it is ignorant whether the required contributions to the Sinking Fund were fixed in the manner prescribed by the contract, and "is informed" that no notice of such fixing was ever received by it, and requires strict proof.

It avers, however (p. 15 5/16 that there was paid by the Boston & Lowell Company, acting for itself and this defendant, "a larger sum than was due and owing to the Sinking Fund from either of them from gross receipts;" and it further admits (p. 23) that its books show, under date of April 26, 1875, there is debited as paid to the Trustees of the Sinking Fund $3,295.13; which it declares "was 31 per cent. "of the amount paid over by the joint Roads to October 1, 1874, to the "Trustees of the Sinking Fund."

Now, how defendant can declare that it has paid over a larger sum than was due and owing to the Sinking Fund without ever having its proportions fixed according to the contract, or how it could debit the above payment to the Sinking Fund and state what proportion it bore to the payments by the joint Roads without such knowledge, is not easy to see.

But it is needless to discuss this point any further. The deposition of Henry A. Church (p. 89), the Treasurer of the Trustees of the Sinking Fund, although it does not show that there was a formal meeting to fix the semi-annual payments to the Sinking Fund, yet shows that they were fixed, acquiesced in, and numerous payments made by each of the third parties for a series of years, in accordance thereto, down to September, 1874. Further, the receipts for each of these payments, as shown by Bartlett's deposition (Record, p. 148), *were signed by all the parties who were by the contract to prescribe the payments to the Fund.*

III.

There are a few allegations of the Bill traversed by the defendant which require but brief comment. Thus, the denial, by the defendant, that the committee which executed the contract annexed to the Bill had authority, would seem to be disposed of by Mr. Abbott's deposition (Record , p 127 and by the fact stated in defendants' answer before referred to, viz., that it ratified and acquiesced in the contract, and made its payments to the Sinking Fund. The denial of the averment in the Bill, that the parties of the second part to that contract have no assets in their hands, is disposed of by the deposition of George Stark. (Record , p 104 and F. G. Smith, Cross-Int. 1, p 46) The denial that the Trustees of the Sinking Fund have no assets in their hands is met by the two depositions of Henry A. Church. (Record, pp 88-94 These show that at the filing of the Bill those trustees of the Sinking Fund had certain *choses in action*, which have since been realized and applied in conformity with the trust; and if the validity of that application be controverted or erroneous, it merely affects the amount of plaintiff's ultimate judgment, if any, against the defendants, to be settled when the account is taken before the Master.

IV.

Next, there is set up by the defendant as a ground of defence, that the contract annexed to the plaintiff's bill was on the part of the parties of the third part *ultra vires*, not within their corporate powers, that the contract provides for the purchase of shares of the Transportation Company, and that plaintiff's advances were applied to that purpose; that the agreement to make such purchase was wholly beyond the lawful authority of the defendants, and it was equally beyond the scope of defendants' lawful authority "to engage to reimburse "the plaintiffs for any part of the $600,000."

It will be perceived that the points involved are two, — namely, whether the third parties had by law authority to enter into the contract with the Transportation Company to prevent withdrawal of the steamers; and next, whether, if there be no such power, then by reason thereof they are exonerated from the repayment to plaintiff of money advanced to defendants to carry out this contract.

Now, the value of this defence depends upon a careful view of the state of facts to which it is attempted to be applied. Those facts are as follows: —

The contract has been terminated and is no longer executory. The alleged illegal exercise of powers beyond the limits of defendant's charter (if established), has ceased. Whether the contract was terminated by acts of the parties before the period fixed by its terms or by the exhaustion of that period is not material. The plaintiff's advances, although not made directly to the third parties, have at their request been made for and wholly applied to their use. Although no profit has been reaped therefrom and no reimbursement been made to the third parties by reason of the ill success of the adventure, yet they have had the use of plaintiff's money, and the chance of success from that use.

Upon this state of facts, we submit that, if defendant shall succeed in showing that the purchase of shares in the Transportation Company, for the purposes set out in the contract, is not within either the express or implied powers conferred by its charter, nor warranted under the general laws of the State applicable to such companies (as to which the burden is seemingly on defendant; see Pomeroy's Specific Performance, p. 76, and 3d McQueen, p. 415), yet, as between the third parties themselves, the contract being terminated, the fact that it had transcended its corporate powers could not be a ground of defence even in suits brought after such termination to redress the inequalities of their respective expenditures and contributions under the contract.

The doctrine as stated in Pomeroy on Specific Performance, p. 78, is, we submit, well warranted by the authorities. It is as follows: "In one of the very latest American decisions the doctrine is laid down by the Court as now settled, that in actions upon contracts, either by or against corporations, where the defendant has received the benefit resulting from the agreement, it is no defence that the contract was not within or incidental to the chartered powers or purposes for which the corporation was created, and that the defence of *ultra vires*, as a general rule, will not prevail for or against a corporation when it will not advance justice, but on the contrary will accomplish a legal wrong. If the defendant has received the benefit of the agreement, it will be a glaring injustice to allow a recovery on the contract to be defeated; and the benefit to be retained by sustaining the defence of *ultra vires* shall be, as *such defence is, a matter which only concerns the corporation in its relation with the State and Government.* If, however, the contract is wholly executory on both sides, — if it consists merely in mutual promises, and neither has given up or received any property in pursuance of its stipulations, — there are not the same reasons for

rejecting the defence, and the determinations of the earlier cases will apply and prevent recovery."

But, be this as it may, it is with some confidence submitted, that to a suit brought by a party to recover a loan or advance made to a corporation, to be used by it as part of its means to carry into effect a contract of the above character, whether such contract was still in the course of execution or after its termination, the law will not permit the corporation to set up the defence that its contract, to the carrying out of which it had applied plaintiff's advances, was beyond its corporate powers, and so its liability to the plaintiff never existed.

The principles which are to govern in regard to defences of this character are declared by this Court, in two recent cases, in support of which various authorities are cited, to be these: "The doctrine "of *ultra vires*, whether invoked for or against a corporation, should "not be allowed to prevail when it will defeat the ends of justice or "work a legal wrong." (Ry. *vs.* McCartney, 96 U. S. R. p. 267; San Antonio *vs.* Mehaffy, 96 U. S. R. p. 315. See also the case of Hitchcock *vs.* Galveston, 96 U. S. R. p. 341).

In the case of plaintiff it is to be noted that its advance was not made to enable the third parties to violate any rule of public policy, or to do an act that would affect the public interest. At the utmost it would be a mere exercise of powers not contained in defendants' charter. This would be a transgression of the Company which concerns only its relations with the Government, and which might be noticed or redressed or not at the pleasure of the Government. So also it might be restrained by suit at the instance of shareholders, as is shown by some of the causes cited by defendant. (See 47th Maine Rep. p. 573; 29th Vermont Report, p. 93.)

It was neither *malum prohibitum* nor *malum in se*. To hold that as to one who loaned money to the parties to such a contract constitutes a *delictus* in which it must be deemed to have participated, would be to hold that loans to corporations, to be used in what may be an excess of their powers, are at the risk of the lender; and we submit that as between the borrower and the lender, whatever may be the rule as between other parties, the borrower is estopped from a defence which imposes on the lender the duty not to rely upon the asserted powers which such borrowing imports, but the duty to scrutinize the charters and take the risk of their construction.

Finally, on this point, *the very question at issue, curiously enough, has been determined by the New York Court of Appeals, in a*

case to which this very plaintiff, under its original organization, was a party (viz., Parish *vs.* Wheeler, 32 New York, p. 494). The head-note is as follows:—

"Nor can a corporation defend itself against a claim *for money paid at its request* to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*, *although the plaintiff who paid the money knew all the facts.*"

VII.

The remaining ground of defence is based upon the character and effect of an instrument dated 17th March, 1877, purporting to be executed by and between the plaintiff and the Central Vermont Railroad Co., Receivers and Managers for the Vermont Central and Vermont & Canada Railroads (Exhibit, p. 63).

The instrument is declared to be a settlement between the plaintiffs and the Central Vermont, receivers, and the managers of the Vermont Central and Vermont & Canada Railroads.

By its first article, the lease of February 24, 1870 (Exhibit, p. 114), is agreed to be terminated as of October, 1866, when the plaintiff procured its road to be placed in the hands of a receiver, as shown by Article 7; and by its second article the rents and all other moneys due the Ogdensburg Company under the contract (lease), and all liabilities under said contract, are fully discharged and released by the Ogdensburg Company in favor of the Central Vermont R. R. Co., receivers as aforesaid, and all other parties *to said lease* or contract; by which terms *the lessees*, viz., the Vermont & Canada and the Trustees and Managers of the Vermont Central and Vermont & Canada Companies are designated.

The Ogdensburg R. R. Co. is to pay (not to the receivers, but) the Vermont Central R. R. Co. $50,000, "in full for all claim for improvements made to the road while in the managers and receivers under the lease."

The remaining articles (except Article 5) have no bearing upon the defence set up in the answers of the several defendants. They merely show the struggle of the plaintiff to get possession of its railroad, rolling stock, and personal property, withheld by the lessees after defaults in the payment of rent (~~see Exhibit, p. ——~~), by the several legal proceedings recited to be still pending, and which, by the settlement, were to be discontinued.

The Fifth Article, which is averred by the answers of defendants to constitute a release and discharge of the claims made by the bill, is as follows: "The Ogdensburg and Lake Champlain R. R. Co. hereby "release and discharge the Vermont Central and the Vermont & "Canada Railroads, and the managers thereof, past and present, and "J. G. Smith and George Stark, named as trustees therein, from all "claims under the boat contract, so called, and from all liability to "contribute to the Sinking Fund provided for in said contract; and "agree to indemnify said roads and managers against all claims that "can be had or may be made against them by the Northern, Lowell "& Nashua and Lowell & Boston Railroads, in respect thereto, growing "out of any recovery against or payment by said last-named parties, "by or to said Ogdensburg & Lake Champlain Railroad Company, "or any other party in privity with said last-named Company."

1st. It is to be noted that this instrument is one to which the "trustees and managers of the Vermont Central Railroad Company and the Vermont & Canada Railroad Company" (the parties to the boat contract, so called) are not parties. The contract or release which it purports to contain is one made or given with or to a new party, viz., "the Central Vermont Railroad Company, receivers and managers of the Vermont Central and Vermont & Canada *Railroads*" (not companies). How the new Central Vermont Company (as distinguished from the old Vermont Central) was constituted, and under what decree and with what powers it became "receivers and managers of the Vermont Central and Vermont & Canada Roads," does not appear. This new corporation purports, as such receivers, to obtain from the plaintiff a release of the old Vermont Central and Vermont & Canada Companies, and of Smith and Stark as trustees, from all claims under the boat contract. How as receivers, with only the ordinary powers of receivers, it could negotiate for a release of the parties to the boat contract, as being within their duty to protect the property in their hands, or in any event without the sanction of the Court, is not shown; and without this the release, if it could have been otherwise effective, would seem to be unimportant.

2d. But assuming that the release contained in the Fifth Article of this contract does legally inure to discharge one of the parties of the third part to the contract annexed to plaintiff's bill, viz., "the Vermont Central and Vermont & Canada Railroads, its trustees and managers," how can such release avail to the other parties of the third part?

If the covenant of those third parties to the boat contract with plaintiff had been joint, doubtless the release of one of them would release all. But since those covenants of each of the third parties were to contribute to the Sinking Fund, or the reimbursement of plaintiff's loan, only a sum graduated by and in a proportion fixed by its own periodical receipts, there could be no joint obligation by which one was to answer or make good the default of the others. This point was raised and distinctly decided by Judges Clifford and Lowell in the case of the Boston & Lowell Railroad Company. (4th Federal Reporter, p. 64.)

It will be noted that the release is carefully limited to the Vermont & Canada Railroads, although it would seem under the powers assumed by the receivers of the Central Vermont they might have included all the other third parties. The other third parties are, however, purposely excluded, and a provision made which shows that, to guard against the possibility of any liability for contribution to those third parties, a clause was inserted covenanting to protect against that liability, should it be found to exist, by its being held that the covenants of the third parties were joint and not several.

Plaintiff assigns as error in the decree appealed from —

The finding and declaration therein contained, that the whole gross receipts from the business mentioned in the contract are pledged to the complainant, but that no payments can be demanded of defendant beyond the amount of those gross receipts.

S. BARTLETT,

for Plaintiff.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1373.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD COMPANY

v.

BOSTON AND LOWELL RAILROAD CORPORATION.

BEFORE CLIFFORD AND LOWELL, JJ.

OPINION OF THE COURT.

[SEPTEMBER 30, 1880.]

LOWELL, J.

This bill is brought for an account, and for payment of such proportion of the money lent by the Ogdensburg & Lake Champlain Railroad Company, the complainant, under an agreement set out in the bill, as is due from the Boston & Lowell Railroad Corporation, the defendant.

The agreement is between The Northern Transportation Company of Ohio, of the first part, and Smith and Stark, who are to act as trustees, of the second part; the Vermont Central, Vermont & Canada, Northern (of New Hampshire), and Boston & Lowell Railroad Companies, of the third part, and the complainant, of the fourth part. It is to be in force for nineteen years from March 1, 1871.

The agreement recites that the several companies own most of the line of railroad between Ogdensburg and Boston;

that it is very important for them to have a regular line of steamers from Western cities and towns to Ogdensburg; that the party of the first part was incorporated to furnish such a line, but is embarrassed, and may be unable to carry out its purpose; that, for securing this end, it is for the interest of the several parties of the third and fourth part to lend to the parties of the second part a portion of the gross receipts from passengers and freight brought by such steamers. It appears, afterwards, that this object was expected to be attained by investing the sums so paid and advanced, in the debts, stock, and bonds of the party of the first part.

The agreement provides that the parties of the first part will keep and run its steamers for nineteen years to the satisfaction of the parties of the second part. That the parties of the third part will, during said term, semi-annually reserve, out of the gross receipts for transportation from said line of steamers, the sum of $150,000, and pay it to the parties of the second part; that the party of the fourth part (the complainant) will, if requested, advance $600,000 for the same purposes, and to be *pro tanto* in lieu of the said semi-annual payments; that, if this is done, the parties of the third part will pay interest semi-annually, at the rate of eight per cent. to the complainant, and will pay into the hands of the presidents and treasurers, for the time being, of the plaintiff and defendant companies, such sums as shall, when invested as a sinking fund, in the judgment of said presidents and treasurers, pay all excess of the complainant's advances above $500,000, within two years from the date of the agreement, and the remainder at the end of nineteen years; and, also, such sums as will, in the judgment of said presidents and treasurers, buy the existing mortgage bonds of the transportation company, within ten years from said date. The said payments to the complainant, and to the trustees of the sinking fund, are to be in place of advances to the same amount as before provided, and are to be ultimately repaid out of the

securities purchased by the parties of the second part. The fifth article concludes thus: "*In no case shall payments to a sinking fund be less than amounts which, invested at six per cent. per annum, will produce the sum to be paid out of such sinking fund.*"

The agreement provides carefully, in article seven, how the parties of the second part shall carry out their trust. They are to procure, if possible, an extension of the time of payment of the mortgage bonds of the party of the first part; they may, if necessary to secure the running of the steamers, buy the debts of that company, whether secured by mortgage or not, and shall immediately transfer them to the trustees of the sinking fund, to be held in trust to pay, first, the sums advanced by the complainant, and next the sums paid, advanced, or lent by the parties of the third part, so long as the semi-annual payments of interest are made to the complainant, and of sums for the sinking fund to the trustees thereof; but, if default is made in these payments, the trustees of the sinking fund, shall, if requested in writing by the complainant, proceed to collect said debts (that is the debts of the transportation company), and out of the sums collected, pay the semi-annual interest, and hold the balance, if any, as part of the sinking fund; "and that all of said sinking fund shall finally, at the end of said term, be applied to pay all advances of the party of the fourth part; and, if any balance shall remain, the same shall be divided among the parties of the third part, in such proportion as they shall be entitled to; and if said sinking fund shall prove insufficient, the parties of the third part shall make up the deficiency out of gross receipts from said business, brought by steamers, as aforesaid."

The bill alleges, that when the agreement was made, the complainant's road, equipments and appurtenances had been leased and demised to the Vermont & Canada and Vermont Central Railroads for twenty years, from March 1, 1870;

that the complainant paid $600,000 to the parties of the second part, in accordance with the agreement; that the presidents and treasurers of the plaintiff and defendant corporations did fix and determine the amount to be paid semi-annually to the sinking fund; that the parties of the third part did, severally, thereafter pay the amount so fixed, in proportion to their respective shares of the gross earnings, until September 1, 1874, and have made no payments since that time, and that there remains due the complainant $392,000; that in January, 1875, proceedings were taken by persons not parties to the agreement against the Northern Transportation Company, and in February, 1876, their steamboats, and other property, were all sold by order of court, and were no longer continued in said service of transportation; that the defendant company is bound to pay to the complainant such proportion of the sum remaining due them for advances as aforesaid as the amount of gross earnings of the defendant from the said business bears to the total gross earnings of the parties of the third part. The bill alleges that this share is not less than one fourth, and asks for an account by which the precise proportion may be ascertained, and for payment of the amount found to be due, and other relief.

The case was argued upon the bill and the defendant's demurrer.

The theory of the bill is that the companies composing the party of the third part are *absolutely bound to pay the* complainant the sums advanced. The demurrer assumes that the payments are to be made *only out of gross receipts from the Ogdensburg business.*

Upon the most careful reading of the contract, we are of opinion that the parties of *the third part have not bound themselves to pay this advance at all events.* It may be difficult to see why the complainant should have made such a contract; but we must take it as it is. It seems to us that

the parties of the third part were willing to rely upon the security which would be furnished by buying up the bonds, stock and debts of the transportation company, and *that the complainant trusted to that and the pledge of the gross earnings of the business. The agreement for securing the complainant seems to us to be summed up in the concluding part of article seven, that "if said sinking fund shall prove insufficient, the parties of the third part shall make up the deficiency out of gross receipts from said business, brought by steamers as aforesaid."*

Upon this construction of the contract it becomes necessary that the bill should allege that there were gross receipts, up to the time when the business was stopped, beyond what was paid to the sinking fund.

Besides this, the bill should either make the trustees, Smith and Stark, and the trustees of the sinking fund, parties, or allege (what we suppose is the truth) that they have nothing of value in their hands applicable to the payment of the complainant's advances.

If the other railroad companies, who with the defendant are parties of the third part, were citizens of this district, or found therein, it would be proper that they should be parties, in order that the total account of gross receipts should be taken in one suit. If they are not within the jurisdiction the suit will not be defeated, because the undertaking of each party of the third part is several; the clause at the end of article seven means that each company shall make up its part of the deficiency to the extent of its share of the gross receipts; and therefore it is a matter of convenience, and not of necessity, that all these parties should be joined.

On demurrer it does not appear that the corporations, whose homes are out of this State, could have been found within it.

The suit is not premature, because the contract has been abandoned through necessity, and the plaintiff is not bound to wait for the defendant to resume payments to a sinking fund

which no longer exists, and which the defendant denies that it is bound to make.

We are of opinion that the whole gross receipts from the business mentioned in the contract which accrued to the defendant during the time that the steamboats continued to run, are pledged to the complainant; but that no payment can be demanded of the defendant beyond the amount of these receipts, and that the bill must be amended before an account of these receipts can be ordered.

Demurrer sustained.

112-311

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Supreme Court of the United States,

OCTOBER TERM, 1884. No. 1009.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD CO.

v.

NASHUA AND LOWELL RAILROAD COMPANY.

DEFENDANTS' BRIEF.

F. A. BROOKS, *for Defendant.*

Supreme Court of the United States,

OCTOBER, TERM 1884. IN EQUITY.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD CO.

v.

NASHUA & LOWELL RAILROAD CO.

DEFENDANT'S BRIEF.

FACTS.

Prior to Feburary, 1870, the plaintiff railroad corporation was proprietor, and in actual possession of a railroad extending from Ogdensburg to Lake Champlain, at Rouse's Point. It connected at Rouse's Point with the Vermont Central and Vermont and Canada Road, extending thence easterly to the Connecticut River at White River Junction. The remaining distance from this point to Boston was occupied by the Northern, Nashua and Lowell and the Boston and Lowell Railroads.

These several roads, together with the Northern Transportation Company, an Ohio corporation for navigating the Great Lakes, constituted a continuous line of transporation between the seaboard at Boston and the ports on the lakes by way of Ogdensburg, called the Vermont Central Line; and this state of things had then existed for many years, each corporation operating its own portion of the line, and taking the earnings on its separate account.

On Feb. 24, 1870, by two contracts of that date (record, pp. 23), the Ogdensburg Railroad, one of these separate

roads, went into the possession and management of the other corporations composing this line easterly of Lake Champlain,— the same parties who a year later became the parties of the third part in the contract A, on which this suit is brought.

[It should be noticed that these two contracts of Feb. 24, 1870, do not purport to be a lease of the Ogdensburg road; none of the terms usually employed in leases are found in either of the two instruments. In the second instrument, it is provided (Sect. 4) that the payments to the plaintiff for its road shall be made from sums reserved out of the gross receipts, etc.; and it is also provided in Sect. 3 that the "liability of each of the parties . . . for . . . deficiency shall be limited to its . . . gross receipts for its own road." Hence, so far as the lower roads (including this defendant) are concerned, the liability for payments in the nature of rental was not absolute but limited or contingent, and the amount to be paid to plaintiff, therefore, was dependent on or limited by the amount of the gross receipts of defendant.]

It should also be observed that it appears from Art. 12 of the primary contract of Feb. 24, 1870, the parties provide for the possible necessity of procuring further legislation in order "to carry this contract into effect," thereby conceding apparently the want of legal authority then existing for such a contract, whether it be construed as a lease strictly, or an agency for the operation of a New York railroad by parties outside that State.

In the same Art. 12 is also found this provision: "It is understood that in case of a large increase of the business of the Ogdensburg and Lake Champlain Railroad . . . the Ogdensburg and Lake Champlain Railroad Company will, so far as they legally can, increase their capital stock or issue their bonds for the purpose of providing funds for such increased facilities," etc., etc.

See articles of agreement annexed to deposition of J. G. Abbott, Art. 12.

Record, p. 120.

It should also be observed that by this agreement the Ogdensburg and Lake Champlain Railroad was placed in the hands of the managers and trustees of the Vermont Central Railroad, being such by virtue of the decrees of courts of Vermont, *i. e.*, receivers, and not acting or contracting *sui juris*, or binding absolutely any property or funds for the performance of their contracts. The plaintiff corporation, while in possession of and operating its own road, was largely dependent upon traffic originating with or derived from the boats of the Northern Transportation Company for its income or revenue.

Answer of plaintiff to cross bill, Sect. 3.
Record, p. 57 .

When the Ogdensburg road passed out of the plaintiff's possession, under these two contracts of Feb. 24, 1870, it went into the hands of Smith and Stark, to be managed by them as an executive committee selected for that purpose, pursuant to the second section of the supplemental contract of Feb. 24, 1870.

See contract annexed to J. G. Abbott's deposition.
J. G. Smith's deposition, second answer. Rec. 243

These two gentlemen, Smith and Stark, came therefore into the actual possession, control and management of the plaintiff's road as agents for the lessees, so called, and as such took the earnings thereof from and after March 1, 1870; that is to say, they became the practical representatives of plaintiff's road as a part of the line in behalf of the several railroad corporations who had become entitled to its earnings.

In the fall or latter part of 1870, the Northern Transportation Company failed, thus ending the boat business on the

lakes with the season of 1870, unless measures should be taken to start them again the next season.

Gov. Smith's deposition, eleventh and twelfth answers.
Record, p. 44.

During the winter of 1870, it transpired that negotiations were pending between Philo Chamberlin, the president of the Northern Transportation Company, and the owner of most of the shares of the capital stock of that company, for the sale of these shares to parties in Montreal, which sale, if effected, would result in transferring the boats from Ogdensburg to Montreal as the eastern terminus of the steamboat line.

President J. C. Pratt's deposition, sixteenth answer.
Record, p. 108.

At the same time, the managers of the Vermont Central line or of the Boston and Lowell Railroad Company, or both, made an application to the plaintiff corporation (Ogdensburg and Lake Champlain Railroad Company) to procure it to issue its bonds to the amount of $1,000,000 "for the purpose of obtaining the control of the stock (*i. e.*, capital stock) of the Northern Transportation Company to hold them (the Northern Transportation Company's boats) to Ogdensburg as a terminal point." This request was made of the plaintiff company "under an implied threat that our lease . . would be broken" unless this was done, and the "earnings of our road would be so reduced by the proposed transfer of the boats to Montreal as to leave them insufficient to pay (meet) the rent of our road," and so cut off dividends on our stock.

President J. C. Pratt's deposition, twenty-third and twenty-fifth answers.
Record, p. 104.

The threat referred to by President Pratt is contained in the letter of J. G. Abbott and John H. George, of Feb. 15, 1870, produced by Mr. Pratt, and annexed to his deposition. These gentlemen, in this letter, state that they had been requested to examine the lease contract (so called) "with a view of forming an opinion as to the duty of the Ogdensburg and Lake Champlain Railroad Company to issue its bonds . . . for the purpose of retaining and securing the business contemplated under said contract" (lease), and they express the opinion that the refusal of the Ogdensburg and Lake Champlain Railroad Company thus to issue its bonds would raise very serious questions, "involving possibly the release of the other parties from the obligations of said contract (lease), and they suggest that if the plaintiff would refer this matter to its legal adviser, it would receive the same advice from him as to the duty or necessity of issuing its bonds in order to preserve its claim for rent under the lease contract.

Record, p. 112.

[Messrs. Abbott and George are understood to have based the opinion that the Ogdensburg and Lake Champlain Railroad Company, plaintiff, was bound to issue its bonds to secure the continuance of the boats in the line, upon that clause of Art. 12 in the lease contract of Feb. 24, 1870, hereinabove quoted.]

The plaintiff corporation met the request for an issue of $1,000,000 of its bonds as aforesaid by an offer to issue its bonds for one half of any amount required to secure the control of the whole capital stock and the business and property of the Northern Transportation Company, "*provided the other roads in Vermont Central line assume and advance a like sum.*"

Deposition of Smith, Exhibits A and B.
Record, p. 46.

From this vote of plaintiff company, passed Feb. 10, 1871, it appears that the plaintiff considered $600,000 as the amount necessary to be raised, and offered to furnish $300,000 if its lessees would raise a like amount.

This proposal of plaintiff contemplated an equal contribution of funds to purchase and hold the boats in line, and an equal and joint risk in the enterprise between the plaintiff and the other roads.

A middle course was finally adopted, as set forth or expressed in three certain instruments of different dates, but executed together as parts of a single transaction, viz.: —

1. Contract A, annexed to plaintiff's bill, dated Feb. 24, 1871.

2. Contract Exhibit B, P. Chamberlin, annexed to defendant's answer, dated March 1, 1871.

Record, p. [illegible].

3. Contract C, Smith's deposition, third answer, annexed to J. G. Abbott's deposition as Exhibit 4, dated Aug. 29, 1871.

Record, p. [illegible].

From this last instrument, it appears that contract A was executed simultaneously with it, namely, Aug. 29, 1871, and not till then.

These three instruments when taken together embody mutual agreements between the plaintiff and the third parties in contract A, for raising funds to the amount, in all, of $1,000,000, to be placed in the hands of Smith and Stark as trustees, and by them employed in the purchase of the capital stock of the Northern Transportation Company, and of the mortgage bonds $400,000, on the property. And these trustees (Smith and Stark), who were already in possession of the plaintiff's road and of its earnings (and who were selected

as trustees of the boat purchase for that reason probably), were to receive and use all the funds so placed in their hands, and the net earnings of the boats also, as means of acquiring the property, and afterward of reimbursing these parties; besides which, the roads in the line were to reserve out of their respective gross receipts from the boat business and pay therefrom, but not absolutely, into a sinking fund, enough money to refund the said sum of $1,000,000 during the term the boats were to be kept running in the line by the Northern Transporation Company, viz., nineteen years.

Obviously there could be no risk in this adventure, unless the boat property should prove worth less than cost, and unless, also, the gross receipts of the business from the boats fed on to the railroads should prove inadequate, that is to say, less in amount than the sums payable into the sinking fund.

These risks, such as they were, must have been plainly seen and understood by all the parties in interest.

The only consideration on which the promise of the third parties to make their payments to the sinking fund could rest, so far as appears, was the expectation of the earnings or receipts to come from the boat business; and if so, the obligation to make these payments could not have been expected to outlast the receipts themselves, or the fund from which the payments were to be met.

The contract of Aug. 29, 1871, annexed to J. G. Abbott's deposition as Exhibit 4 (Record, p.), of itself furnishes a construction of contract A in this regard. It refers to the provisions of Art. 2 of contract A, as "providing for a *contribution* by said parties of the third part from the gross receipts," etc.

Of course, a contribution from any particular source or fund cannot, in any event, be supposed or expected to exceed the amount of such fund.

Contract A does not purport to be for plaintiff's benefit merely.

It embraces or sets forth several agreements of different parties distinct from each other, and creates in Smith and Stark (the parties of the second part) certain trusts for the benefit of the other parties, the plaintiff included.

It also contains the agreement of the Northern Transportation Company as party of the first part that the boats should be maintained or kept in the line to Ogdensburg; and it is this agreement of the Northern Transportation Company on which all the other provisions of the contract seem to be based. It contains no promise by the third parties directly to the plaintiff, except to pay the interest on its advances at eight per cent out of the gross receipts. All other payments under the contract are to be made to or through the agency of trustees for carrying the terms of the contract into execution and reimbursing all outlay under the same according to its terms.

Under date of March 4, 1871, Stark and Smith, the trustees and parties of the second part in contract A, addressed the president of plaintiff corporation a letter, offering to receive its bonds in lieu of money for the advances to be made to "us" (them) "under the agreement to secure steamboat connections west of Ogdensburg."

Exhibit D, annexed to first deposition of Church.
Record, p. 94.

This proposal was subsequently (Oct. 7) adopted, and the bonds taken by the trustees of plaintiff in lieu of money, without, however, any knowledge or assent thereto by this defendant, so far as appears.

Exhibit E, attached to first deposition of Church.
Record, p. 94.

Only 576 of these 600 bonds of the plaintiff corporation were in fact furnished to the trustees Smith and Stark, that

is to say, only $576,000 was in fact advanced by plaintiff, and not $600,000, as stipulated.

Deposition of Bartlett, 7th answer, and Exhibit A.
Record, p. 144, 147

[It does not appear that the third parties in contract A ever knew of this diminution of the amount agreed to be advanced by the plaintiff for this boat purchase, till after this suit was brought, as in fact they did not.]

Smith and Stark, parties of the second part in contract A, negotiated with Philo Chamberlin, president of the Northern Transportation Company, for the purchase of 5,500 of the 8,500 shares of stock in that corporation at the price of $418,000, or $76 per share, and acquired these shares.

P. Chamberlin contract, Exhibit B, annexed to defendant's answer.
J. G. Smith's deposition, third answer.
Record, p. 43.

The trustees put contract A into execution in all other respects, and down to September, 1874, they had received of the parties of the third part, in money, under and in pursuance of the said contract, the sum of $566,354.01

During the same time the parties of the third part had paid into the sinking fund the further sum of 271,880.00

And had paid, by way of interest on the bonds issued by plaintiff company, the further sum of 122,160.00

Making in all as paid by third parties under said contract to September, 1874 . . $960,394.01

Deposition of C. E. A. Bartlett, cross-answers 27 & 28.
Record, p. 146

It thus appears that the plaintiff and the parties of the third part both together had raised or contributed in pursu-

ance of contract A, down to September, 1874, the amount, in all, of $1,536,394.01; much more than half of which had been paid in by the third parties.

In the fall of 1874 came the final failure of the Transportation Company, after which its boats were no longer run agreeably to contract A, but were sold out, and the business of the Northern Transportation Company wound up or closed.

For this reason, contract A was no longer performed or lived up to by either the Northern Transportation Company or Smith and Stark, the trustees, who had in the mean time succeeded to the property and rights of the Northern Transportation Company, or by the plaintiff, who might have retained the boats in line, and so have continued to hold the third parties responsible for its advances to the extent of their gross receipts, had it seen fit to incur the expense of doing so through the trustees, Smith and Stark.

Nothing more is heard of contract A, after the close of navigation in 1874, until March 17, 1877, when a general settlement was had between the plaintiff and the receivers and managers of the Vermont Central and Vermont and Canada Railroads of all matters between them, as appears from J. G. Smith's deposition, seventeenth answer, and Exhibit X, annexed to stipulation of April 23, 1883.

Record, p. 45
" " 63

The first section of this instrument of March 17, 1877, terminates (as of October, 1876) the lease of plaintiff's road (dated Feb. 24, 1870); and this, too, in direct violation of the eighth section or clause of the supplemental or second of the two contracts of Feb. 24, 1870.

Exhibit A, annexed to J. G. Abbott's deposition.
Record, p. 63, 124

By the second section of the instrument of March 17, 1877, it appears that for this surrender of the lease of plaintiff's road the plaintiff paid $50,000 to the receivers and managers, to whom the lease ran, and by the fifth section of the same instrument it appears that these same managers also got for themselves and for Smith and Stark, the trustees for all parties under the boat contract, a release of the boat contract itself, and of all liability to contribute to the sinking fund therein provided for.

The release is in these words: —

"The Ogdensburg and Lake Champlain Railroad Company hereby release and discharge the Vermont Central and Vermont and Canada Railroads and the managers thereof, past and present, and J. G. Smith and Geo. Stark, named as trustees therein, from all claims under the *boat contract, so called*, and all liability to contribute to the sinking fund provided for in said contract."

Exhibit X, stipulation of April 23, 1883.
Record, p. 63.

[It is not true, as set forth in the plaintiff's brief (p. 30, Sect. 1), that the Central Vermont Railroad Company, in whose favor this instrument (release) was made, was a new party to this transaction; that is, a different party from the trustees and managers mentioned in contract A and in the lease of plaintiff's road.]

Between 1871 and 1877, the Central Vermont corporation had, upon application of the persons previously acting as such receivers, been appointed to that office as their successors. This fact is shown in Sect. 5 of this release by the reference there made to the managers, etc., "*past and present*"; and it is obvious that, unless this were so, the Central Vermont Railroad Company could not have surrendered the lease of plaintiff's road running to the former trustees and managers, as they undertook to do in the first section of this instrument of March 17, 1877.

Three years more pass silently, so far as contract A is concerned, until June, 1880, when this suit was brought, a short time only before the claim would have been barred by statute of limitations.

The bill was originally against the Nashua and Lowell Railroad and George Stark, and the theory and allegations of the bill were to the effect that the defendant, as one of the third parties in contract A, became (with the other third parties) absolutely bound and liable to the plaintiff for the repayment of the sums advanced by it, it being alleged that said advances constituted a loan made by plaintiff to defendant and the others (third parties) at their request and for their benefit, and on their promise of repaying said loan by contributing to a sinking fund sufficient means for that purpose for the term of nineteen years then next ensuing.

The plaintiff's bill also asserts (Sect. 5) that, by reason of the so-called lease of plaintiff's road made in February, 1870, the plaintiff, in 1871, had no motive or inducement whatever for entering into this agreement for furnishing $600,000 in order to preserve the steamboat connection at Ogdensburg, except by way of loan. This allegation is not only unsupported but is entirely disproved by the testimony of J. C. Pratt, the president of plaintiff coporation at the date of contract A. Mr. Pratt was asked (Int. 40) what interest the Ogdensburg Railroad had in making the contract of Feb. 24, 1871 (boat contract). He said, "Why, we had the greatest possible interest in making connection with the Northern Transportation Company, as I stated this morning. Our interest was to maintain the connection with the Northern Transportation Company, having Ogdensburg for its eastern terminal point. . . . To have lost this business by the withdrawal of all connection with the Northern Transportation Company would have been fatal to the interests of the road, and for that reason we made the con-

tract that we did. I might add, speaking of the motive why we made that contract, . . . that it would have been wiser and better for the Ogdensburg road to have contributed $600,000 outright than to have broken the connection with the Northern Transportation Company."

Also Pratt's deposition, twenty-fifth, twenty-sixth, twenty-seventh, and thirty-second answers.

Record, pp. 110, 111.

The question whether the contribution to the sinking fund required of the third parties in contract A was limited to or by the amount of the gross receipts, or was unlimited in amount, and payable absolutely, was first raised in another like suit, now pending in the Massachusetts District, and was heard and passed upon by Judges Clifford and Lowell in that suit. They held that the parties of the third part to this contract did not become bound to reimburse the plaintiff's advances, any further than could be done out of the gross receipts which came into the defendants' hands from the business derived from the boats themselves, and, consequently, that the liability of the defendants was limited to the amount of such gross receipts, and, therefore, dependent on such receipts being realized. Upon this ruling, — that the liability of the defendants (third parties) was contingent upon the gross receipts coming into the hands of the defendants respectively, — the plaintiff amended its bill so as to hold the defendants to the extent of such gross receipts in case the claim of absolute liability should not be finally sustained; and at the final hearing of that case (in May last) the plaintiff again asserted before the court its claim for the repayment, through the sinking fund, of all its advances, whether the gross earnings which the defendants received were sufficient for that purpose or not.

The Court (Judges Gray and Nelson) heard both the cases,

and concluded to follow the views of Judges Clifford and Lowell as to the construction of the contract, out of respect to them, and not to revise the opinion already expressed by their predecessors on this question. The plaintiff was, however, allowed the option of pursuing its claim for gross receipts only, by an accounting before a master, or of submitting at once to a dismissal of its bill and obtaining by appeal a revision of the conclusions reached by Judges Clifford and Lowell as to the construction of contract A in this regard.

The plaintiff elected the latter course, conceding that the defendant was not chargeable in this case, on the score of gross receipts, and thereupon the plaintiff's bill was dismissed and the case brought to this court by appeal.

LAW.

I.

It being conceded that defendant is not chargeable in this case on the score of gross receipts from the boat business, the only question is, whether the Circuit Court was in error in holding that the parties of the third part in contract A did not engage to continue to make contributions to the sinking fund, therein provided, in excess of the amount of their respective gross receipts from the business of the boats until the plaintiff should be reimbursed its outlay.

The allegation on this point in plaintiff's bill (end of Sect. 4) is in these words: —

"And said parties of the third part thereupon severally agreed that the respective payments thus to be made by them to said sinking fund should in no event be less than amounts which, invested at six per cent per annum, would produce the sums to be paid out of such sinking fund," viz., the $600,000 advanced by plaintiff, and the $400,000

of Northern Transportation Company's mortgage bonds, in full.

Record, p. 3.

The plaintiff attempts in his brief (pp. 4 and 5) to support this allegation by assuming that the plaintiff's advances of money in the enterprise of retaining the steamboats in the line were by way of loan, "*made for and on behalf of the third parties.*"

(These last words are quoted by us from plaintiff's brief, p. 4, line 7 from the bottom.)

Record, p. .

On p. 5 of plaintiff's brief (seventh line from the top) it is said, "such advances . . . import an agreement with the *lender*" of repayment, etc. The term "loan" is used in other places in the brief to show the plaintiff in the position of a lender and the defendant as a borrower.

Record, p. .

All this is, we submit, wholly gratuitous, and without the slightest foundation in fact or evidence.

The plaintiff's money (or bonds) never went into the hands of the third parties, or either of them, or to their use and benefit; and they never applied to the plaintiff for any money, by way of loan or otherwise, in aid of this enterprise. According to the testimony of President Pratt (twenty-third answer), the Vermont Central and other parties of the third part did propose to plaintiff that it issue its bonds ($1,000,000 in amount) in order to obtain the stock of the Northern Transportation Company, but not as a loan to any one.

This proposition (Mr. Pratt says, twenty-fifth answer) was accompanied by an implied threat that a failure to comply

would result in a breach of the lease of plaintiff's road, or non-payment of rental; and in his thirty-fourth answer he shows that, in making this application for the plaintiff's bonds, the third parties (or their counsel) took the ground that plaintiff was bound by the terms of the contract of lease (then held by the third parties) to issue its bonds on request of lessees, the provision in the lease being that in case of such issue of bonds the lessee party was to pay "*interest on such bonds* at not less than *eight per cent per annum*, free of government tax."

See Art. 12, Lease. Rec p. 120
Record, p. 110, 112

If the bonds had been issued in pursuance of this demand or requisition made for them under the contract of lease, the third parties would have become accountable for the interest, though not for the principal.

If, on the other hand (as now asserted by plaintiff), the bonds were issued under contract A in lieu of money and by way of loan to the third parties, the rate of interest (eight per cent) was, by the law of New York, usurious, and the contract void on that account; hence the contract should not be construed as a loan. "*Ut magis valeat quam pereat.*"

Revised Statutes of N. Y. (6th ed.) vol. 2, p. 1165, § 5.

Courts of the United States take judicial notice of the laws of the several States, and no proof of such laws is necessary.

Owings *v.* Hull, 6 Peters, 607.
Railroad Company *v.* Bank, 12 Wall. 226.

But the theory, that the plaintiff's advances to this scheme were made to and accepted by the third parties as a loan, must fail for other reasons. They were not made in the form of money, nor to the parties of the third part, and there was

no direct promise of repayment of the same, either to the plaintiff or any one else, and the sinking fund itself was intended to go not merely to reimburse the plaintiff's advances of $600,000, but also to the purchase of the bonds of the Northern Transportation Company, then outstanding to the amount of $400,000.

First deposition of H. A. Church, Exhibit A.
Record, p. 91 .

It is true that the words "lend" and "lent" are used in the recitals at the beginning of contract A with reference to the funds to be raised and placed in the hands of Smith and Stark to carry out the scheme of acquiring the boats by purchase, whether the funds came from fourth party or third parties; but the second parties are there mentioned as the lendees or borrowers, and the parties of the third and fourth part are both referred to as lenders to said second parties.

This seems inconsistent with the plaintiff's claim that the third parties were by the contract the borrowers and the fourth party (plaintiff) the lender to them; and, on reading Art. 4 of the contract, it will be seen that these terms were not appropriate to express the relation of the second parties to those who were to furnish the funds, since it is there provided that the second parties are not to assume any personal liability for the return or repayment of any money placed in their hands.

II.

It is said, however, that the allegations in plaintiff's bill, that the sinking-fund payments were to be kept up for nineteen years *absolutely and at all events*, are supported by the sentence or clause found at the end of Art. 5 of contract A in the words following, viz.: "In no case shall payment to a sinking fund be less than amounts which, invested at six per cent

per annum, will produce the sum to be paid out of such sinking fund."

Plaintiff's brief, p. 11, V.

[In order to avail of this clause in support of its position, the plaintiff is obliged to substitute the definite article "*the*" for the indefinite article used in the contract itself.

Plaintiff's brief, p. 12, eleventh line from top.]

Record, p.

The plaintiff's brief (pp. 11–15) contains a very elaborate argument to show that this final paragraph in Art. 5 requires the sinking-fund payments to be maintained by the third parties during the term of nineteen years, even though all the other parties (first and second part) should have abandoned the enterprise as hopeless, as in fact they did after 1874; and one reason assigned for this construction of the contract is, that, under the provisions of the contract which precede the fifth article (especially Art. 2), the arrangement was that the third parties were to pay over to the second parties (Smith and Stark) $150,000 semi-annually, or $300,000 per annum, to be expended in acquiring the boats and maintaining the lake navigation, and in repaying any advances or loans to them (second parties) by the plaintiff (fourth party) with interest at ten per cent per annum; and that the plan as set forth in Art. 5 (which was actually adopted) made provision, by means of a sinking fund, not only for the repayment of plaintiff's advances with interest at eight per cent, but for meeting a further outlay of $400,000, in the purchase of the bonds of the Northern Transportation Company, and that the $300,000 per annum provided by Art. 3 would not have been sufficient to repay plaintiff's $600,000 advances and also the $400,000 bond purchase, and that the rate of interest payable to plaintiff under Art. 5 was reduced from ten per cent to eight per cent. The

plaintiff suggests it was to make up for the disadvantages to plaintiff of these changes, that the sentence found at the end of Art. 5 was inserted, thus, as plaintiff says, removing the limit of $300,000 per annum as the third party's liability for contribution, and substituting therefor a liability of making sinking-fund contributions to be continued for a period of nineteen years, which latter liability is said to be greater in amount than that provided for in Art. 2.

Now this very ingenious and fine-spun theory as to the reason for introducing this clause is entirely fanciful and, as we submit, totally unfounded. In the first place, the closing sentence of Art. 5 does not mean anything of the kind contended for by the plaintiff. Its sole meaning or significance is (as we say) to determine at what rate of interest the sinking-fund calculation should be made up in order to realize the amount required to be produced at the end of the nineteen years, and thus to furnish the sinking-fund trustees with a rule of computation.

Except for this clause, the trustees of the sinking fund would have had no guide to enable them to fix upon the amount of the semi-annual payments to be required of the parties of the third part, and without this provision it would have been impossible for the parties of the third part to know whether the sums named by the trustees for the sinking-fund payments were correct or not.

This seems to us to have been the real and sole purpose of this clause, and if the grammatical construction of the sentence were correct and complete, it would, we think, read thus: "*In no case shall the payments to a 'sinking fund' as fixed by the trustees be less than amounts which, if invested at six per cent per annum, would produce the sums to be paid from or out of the proceeds of such sinking fund.*"

When it is observed that the whole of Art. 5 preceding this very clause, sets forth what should be done if or only "in case the party of the fourth part shall advance . . . sums amounting to $600,000," how can it be supposed for a moment that this final clause should have the effect of fixing the third parties with an absolute liability, before it could be known whether or not the contingency would arise upon which Art. 5 was to become operative at all?

The words "*in no case*," on which so much stress is laid (brief of plaintiff, p. 13), as we submit, were not introduced for the benefit of the plaintiff at all, but for that of the contributors to the sinking fund, and to prevent such contributors from being required to pay into the sinking fund larger sums than would, if put on interest at six per cent, yield the amount required.

There is, however, another consideration which seems opposed to the plaintiff's theory as to the meaning of this clause at the end of Art. 5. It cannot be denied that the sinking fund of Art. 5 does not provide for the interest of the plaintiff's advances (eight per cent annually), nor that this interest payment, payable by third parties directly to plaintiff, was made dependent on the existence of gross receipts sufficient for that purpose (record, p.). If so, is it likely that the parties intended to make a distinction between the obligation of the third parties to meet the payments of *interest* and of *principal*, the interest payments being made to depend on receipts from the business, and the principal payments not being so dependent?

If this final sentence of Art. 5 has no such meaning as is imputed to it by the plaintiff in his brief, it may be unnecessary to notice the reasons assigned by the plaintiff for its introduction into the contract.

Yet we may, perhaps, be excused for stating our understanding of the difference between Arts. 3 and 5, in opposi-

tion to the plaintiff's suggestions on this point. It appears to us that the plan as set forth in Art. 3 contemplated as large an outlay as was considered necessary to acquire the ownership and control of the boats, including, of course, the $400,000 mortgage on them, say, in all, $1,000,000, *i. e.*, $600,000 to buy up the stock, and $400,000 to retire the mortgage bonds; less than this would not answer.

Had this plan been adopted, the yearly contributions of $300,000 would have paid the entire cost of the boat property ($1,000,000) in four or five years, or in one fourth of the time fixed by the sinking fund, the annual payment to the sinking fund being only $93,000 at first and diminishing rapidly each year. But this first plan, though it called for much larger annual payments than the other, was yet wholly impractical, because, in order to buy up the stock and control of the Northern Transportation Company (a failed concern), it was necessary to have the money in hand. It was necessary to use the money at once, and before it could be got from the business receipts; *i. e.*, the boats must have been first bought and paid for, as a condition of getting earnings from them.

One of the points made by plaintiff's counsel is that the continuance of the contributions of the third parties to the sinking fund could not have been made contingent on success of the plan for retaining the boats and getting earnings therefrom, since, if it were so, the plaintiff would take all the risk of losing its advances in case of a stoppage of the boats at any time, while the third parties would be subjected to no loss whatever in such event.

Now this affords no means of getting at the intention of the parties, since it does not appear, and probably is not true, that there ever arose in the minds of the parties a doubt that if $600,000 in cash were raised and the boats bought therewith and paid for, subject only to a mortgage not then paya-

tract. The counsel admits that the several third parties were not to contribute equally to the sinking fund, but only in proportion to the share of benefit, which they respectively received from the contract.

Now, if this be so, does it not follow that, after the boats had ceased to run and the gross receipts had wholly failed, no means were then left of ascertaining the proportion in which the parties of the third part were bound to contribute to the sinking fund (if bound at all to do so), and consequently no means of computing the amount of the alleged liability of either of the parties of the third part to the plaintiff. And if there is nothing contained in the contract which will enable this Court to fix the amount of such supposed liability, after the boats had stopped in 1874, must not the plaintiff's suit fail for that reason alone, *i. e.*, because the contract itself is wanting in the element of certainty, which the law deems necessary for the enforcement of contract rights?

[The plaintiff does not claim that any gross receipts went into defendant's hands after September, 1874.

See stipulation, record, p. 67.]

III.

If, however, the Court below was in error in its construction of contract A, and the plaintiff is correct in the position taken in his brief (p. 12, below middle), that the clause at end of Art. 5 constitutes an absolute covenant of the third parties, by which "it is declared that in no case shall the sums paid by the third parties to the sinking fund be less" than sufficient to produce the amount required to repay the plaintiff's alleged loan in full, and is also correct in the position taken in the brief at the bottom of p. 22, that the liability so assumed by parties of the third part was several

and not joint, then it would seem as if the plaintiff, as against this defendant alone, would have a plain and adequate remedy at law, and therefore cannot maintain this suit in equity.

U. S. Rev. Stats., § 723.

If, on the other hand, the liability assumed by the parties of the third part was joint and not several, this suit in equity must fail because of the nonjoinder of the other parties of the third part as defendants, and especially that one of them residing in the district of New Hampshire, viz., the Northern Railroad Company.

See demurrer of defendant to plaintiff's bill for nonjoinder, etc.
Record, p. 12, 13

So long as the plaintiff sought by its bill in this case to recover a sum dependent on the gross receipts realized by this defendant, and required an accounting for the purpose of fixing the amount to which it might be entitled, the plaintiff might, perhaps, properly sue in a court of equity. But this ground of recovery has been abandoned in this case by stipulation filed therein, and so jurisdiction in equity is no longer claimable as necessary for an accounting.

IV.

But whatever was the liability to the plaintiff assumed by the parties of the third part in contract A, that liability was by the plaintiff released and discharged by the instrument of March 17, 1877.

See stipulation of April 23, 1883, and Exhibit X.
Record, p. 63

[It is said, however, by plaintiff's counsel, in his brief (p. 30, middle), that this release runs to the Central Vermont Railroad Company, which company was not a party to the boat contract, and so is not available by such parties or any of them.

The learned counsel fails to notice that this release (Sect. 5) runs directly in favor of the managers of the Vermont Central and Vermont and Canada Railroads, and then adds these words, "*past and present*," and as the Central Vermont Railroad Company are described in the heading of the release as the *then* receivers and managers of these railroads, this objection to the release is evidently frivolous.]

In order to understand the operation of this release, let us assume for the sake of argument that the plaintiff is correct in the position now taken in this case, that under the contract all the parties of the third part became bound absolutely to continue their contributions to the sinking fund for the term of nineteen years.

Bear in mind the amount to be raised by this sinking fund was in all $1,000,000, of which $600,000 was to reimburse the plaintiff's money used in purchasing stock or boats, and $400,000 to be used in the purchase of the outstanding bonds of the Northern Transportation Company secured by mortgage of the boats.

The sinking fund thus to be raised was finally to be disposed of at the end of the term in the first instance to pay all advances of the party of the fourth part (plaintiff), and if any balance should remain either in the form of the Northern Transportation Company's bonds purchased or in cash, the same was to be divided among the parties of the third part in such proportions as they would be entitled to.

Art. 7 of contract A, end. Rec. f. 10.

By Art. 3 of said contract A, it was provided that all the property and rights acquired by the second parties (Smith and Stark), trustees, etc., were to be held by them in trust to reimburse the plaintiff and the third parties for all

sums furnished by them or either of them in aid of the enterprise, and that the third parties were the beneficial owners of the same, after such reimbursement.

The parties of the third part and all of them, down to Sept. 10, 1874, had paid into this sinking fund $253,500 or more, that is, over one fourth of the entire amount to be so raised.

Bartlett's deposition, twenty-eighth answer.
Record, p. 146
Church's first deposition, first answer.
Record, p. 92.

Now upon plaintiff's theory of an absolute liability of all the third parties to continue or keep up these sinking-fund payments for nineteen years, each of said third parties was entitled to insist that the others should also be held to such future payments, otherwise the amount expected from the sinking fund would not be realized, and the plan of reimbursement would necessarily fail, and all contributing parties subjected to loss, not from depreciation of the property or mismanagement, but from non-observance of the terms of the contract.

It was just as necessary to the success of the plan of securing the boats permanently, that the $400,000 to be used in buying up the bonds of the Northern Transportation Company should be raised, as that the $600,000 should be raised for reimbursing the plaintiff for its funds invested in the purchase of the capital stock of the corporations. The shares and the mortgage bonds both together represented a complete title to the property to be acquired by the parties of the third part, through their contributions to this sinking fund. The plaintiff well knew this, and also knew that to accomplish this under the contract the contribution of the trustees and managers of the Vermont Central Railroad, as

well as of the other third parties, must be kept up during the whole nineteen years, those contributions constituting in fact three fourths in amount of all the contributions to be made for those purposes.

And yet the plaintiff, well understanding all this, did, on the seventeenth day of March, 1877, execute the instrument wholly releasing the managers from the boat contract A and from all liability to contribute to the sinking fund therein provided for.

This release, of course, rendered it impossible for the other parties of the third part to enforce any further payments by the managers to the sinking fund, if so disposed, and rendered it impossible to raise the whole amount required for the sinking fund; in other words, by this release the other parties of the third part were deprived of the benefit of so much of the sinking fund not then raised, as the trustees and managers were by the contract to furnish.

It cannot be said with truth that the third parties, if still bound to contribute to the sinking fund, yet had no interest in enforcing the payments into this sinking fund by the other original contributors.

But it is said by plaintiff's counsel (brief, p. 31, top), "If the covenant of those third parties to the boat contract with the plaintiff had been joint, doubtless the release of one of them would release all." "But . . . there could be no joint obligation by which one was to answer or make good the default of the others."

To this we reply: —

First: the third parties made no covenant directly with the plaintiff except to pay interest to plaintiff on its advances out of their respective gross receipts; and this interest claim is abandoned by the plaintiff or not set up at all in the bill.

Art. 5, contract A.
Record, p. 9 .

Secondly: we say the plaintiff's counsel assumes, contrary to fact, that the plaintiff, under contract A, was and is the only party interested in or entitled to the benefit of the sinking-fund payments or of the fund itself. If this were so, it might perhaps be true that the plaintiff could discharge this claim as against some of the third parties, and reserve it as to others. But such is not the case. The parties of the third part (by Art. 5) agreed with each other (though not directly with plaintiff except for interest) that they would contribute to and raise a sinking fund sufficient to reimburse plaintiff's advances of $600,000 (if made), and also sufficient to purchase the bonds secured by mortgage on the boats of $400,000.

It seems to us that these third parties did thereby in legal effect also agree with each other that they and each of them would do their part towards raising the entire amount required by the contract, viz., $1,000,000, without which there would necessarily be a deficiency or failure to pay for the property to be purchased by them all on joint account and jointly owned.

If we are correct in this position, it must follow (we think) that the act of the plaintiff in releasing the trustees and managers from all contributory liability not only to the $600,000 fund but to the $400,000 was such a departure by the plaintiff from the terms of the contract, that the plaintiff at least cannot now be allowed to enforce this contributory liability as against the other third parties not included in the release. The plaintiff should not be allowed to repudiate the contract in some of its bearings, and enforce it as to others at the same time.

There is still another reason why, in a court of equity, the plaintiff should not be permitted to hold this defendant (or the other parties of the third part) in this case.

It appears from the first clause or section of this same instrument of release of March 17, 1877, Exhibit X, that the plaintiff obtained by it from one of the parties of the third part in contract A, or its successor or legal representative (then in possession of the Ogdensburg Railroad under the so-called lease of Feb. 24, 1870), a surrender of that road and a termination of the lease, the said lease being held at that time for the joint use and benefit of all the third parties in contract A, and it being one of the provisions of the instrument by which it was so held that it should not be "*modified, changed or abrogated*" by the trustees and managers (original lessee parties) without the written consent of the other third parties in contract A.

See contract, Exhibit A, Sect. 8, J. G. Abbott's deposition.
Record, p. 124.

When it is observed that by the surrender of this lease the managers not only got themselves released by the plaintiff from the boat contract but also got the sum of $50,000 of plaintiff's money by way of consideration for the violation by them of the agreement not to surrender or "abrogate" the lease, etc., which they do not offer to account for to defendant, it will be perceived that a fraud was perpetrated thereby upon this defendant and the other third parties in contract A with the participation of the plaintiff, and that if the plaintiff is to realize the benefits of that fraud, it must at least be held accountable to this defendant (and the other third parties aforesaid) for their proper share of the $50,000 so paid over to the managers as the price of the termination of the lease.

[This transaction alone seems to show that complete justice cannot be done the parties of the third part in contract A, except in a suit to which the trustees and managers are made parties, and that this suit in equity ought to fail for nonjoinder of the trustees and managers or their successors, for this reason if for no other.]

V.

If the construction of contract A now insisted upon by the plaintiff is adopted by this Court, then the contract becomes as to this defendant (and the other third parties) a contract for reimbursing the plaintiff its advances, and not merely a traffic contract or pledge of the traffic receipts to such reimbursement; and, inasmuch as the plaintiff's advances were made for the purpose of purchasing the capital stock and property of the Northern Transportation Company as a permanent investment, and of carrying on the business of that company through Smith and Stark, the parties of the second part, as trustees alike for all concerned, and as these advances by plaintiff were actually used by these trustees in making the stock purchase and afterward in operating the boats so acquired, we submit it was beyond the lawful power of the defendant corporation to enter into such a contract.

Davis *v.* Old Colony R. R., 131 Mass. 258.
Thomas *v.* Railroad, 101 U. S. Rep. 71.
Coleman *v.* Eastern Counties R. R., 10 Beavan, 1.
Milbank *v.* N. Y. & L. E. R. Co., 64 Howard (N. Y. Pr.), 20.

It appears from the deposition of J. G. Smith (thirteenth, fourteenth and fifteenth answers) that before contract A was made, the whole subject of the legal power of the lower roads to enter into such a contract was fully considered, and legal advice taken to the effect that the lower roads could not lawfully contract or become liable except to the extent of the traffic to be secured thereby; that is, they could not bind themselves absolutely, as is now claimed by plaintiff they did.

Record, p. 45.

It is not probable that, acting under such advice as this, they would enter into a new contract not capable of being discharged from the gross receipts of the business. The same parties, in hiring the plaintiff's road in 1870, confined their liability to the receipts, and this contract A of 1871 seems to have been modelled after that of 1870 in this respect.

This same thing was understood equally well by the plaintiff, since President Pratt, in his deposition, states that the plaintiff's legal adviser told them that the contract (meaning, as we infer, the lease) was not, in his opinion, legally enforceable.

> Pratt's deposition, twenty-fifth answer.
> Record, p. 110.

The courts of New Hampshire, under the laws of which State this defendant exists as a corporation, and by which laws its powers as a corporation must be determined, have gone much beyond the foregoing citations, and have held that it is not even competent for a railroad corporation of that State to enter into joint traffic contracts, so called, with other roads; that is, contracts by which the traffic of several different roads is pooled, or taken on joint account and divided between them.

> Pearson *v.* Concord R. R., 13 Am. & Eng. R. R. cases, 102.
> Pearson *v.* Concord R. R., 28 Albany Law Journal, 366.
>
> [This case is not yet reported in N. H. Reports.]

The plaintiff attempts to meet this difficulty by two suggestions; it says: —

First: that the plaintiff's money was advanced to the defendant (and other third parties in contract A) as a *loan*,

and so it is immaterial to what use this money was put by the defendants, even though defendants had no right to borrow for such purposes, and the plaintiff was fully cognizant of the appropriation intended and in fact made by defendants.

Secondly: it (plaintiff) says that contract A had been terminated, and was no longer executory at time of suit brought.

Plaintiff's brief, p. 27, top.

To the plaintiff's first suggestion by way of avoiding this defence, we simply say it is not true in fact, as hereinabove shown or attempted by us.

See President Pratt's letter to Stark, Nov. 9, 1871, Record, p. 66, 67.

The second suggestion has the merit of truth in its favor. Contract A was terminated or abandoned by mutual consent since September, 1874, when the boats stopped, and nothing has been done since by way of executing it. If the provisions of the contract which required the boats to be run for a term of nineteen years had been observed by the first party, or Smith and Stark, successors of the first party, or by the plaintiff, or any one who stood in the shoes of the Northern Transportation Company under the contract in September, 1874, it would also, as we presume, have been lived up to by this defendant and the other third parties.

If the plaintiff were able to say that contract A had become fully executed or performed on one side, so that the third parties had realized all its benefits, and that it remained executory only as to what remained to be done by them, such a statement would, we admit, have afforded a good legal answer to this part of our defence.

The fact that the plaintiff may have done everything di-

rectly required of him by the terms of the contract does not help his case, so long as there has been a failure on the part of others to keep and perform material portions of the contract which furnished the very consideration on which the third persons undertook to perform on their part. The plaintiff cannot eliminate from the rest of the contract what was done by him, and insist that nothing more was required to be done by way of complete performance.

VI.

The cases above cited are to the effect that railroad corporations have no lawful power to engage in operations wholly foreign to the purposes of their existence as defined by their respective charters.

In this particular case it is not pretended that the corporate body, here defendant, ever entered into contract A unless through its directors. We submit it was not competent for the directors to do this, even if it were competent for the body corporate acting through its stockholders to do it.

Such a contract does not come within the powers devolved by law or usage upon directors of a corporation in any case.

Allerton *v.* Railroad, 18 Wall. 223.
Cass *v.* Manchester Iron Co., 9 Fed. Rep. 640.

VII.

Although this brief has proceeded thus far upon the implied admission that this defendant, as a matter of fact, became a party to contract A, and is bound thereby as a party, and although defendant does not now wish to question this if contract A shall be construed in this court as it was by the

court below, yet if this court shall determine that contract A puts the parties of the third part under liability to contribution to plaintiff from or out of their own separate funds, not arising from the boat business, then the defendant will insist on the denial set forth in its answer, that it ever lawfully became a party to contract A. In its answer, the defendant admitted (record, p. 14) that a contract in the words of contract A was signed by F. B. Crowninshield, J. G. Abbott and George Stark, said gentlemen "claiming to be a committee duly authorized by this defendant corporation . . . to sign said contract." "But this defendant denies that any such committee was ever lawfully appointed by it or authorized by it to execute such contract, and requires strict proof thereof." . . .

The only proof offered on this point consists of the deposition of J. G. Abbott. From this it appears that, at a meeting of the directors of both this defendant corporation and the Boston and Lowell Railroad corporation, a vote was passed constituting the said Abbott, Stark and Crowinshield a joint committee with authority to execute the contracts, and that they did execute them. By reference to the signatures to the supplemental instrument of Aug. 29, 1871 (executed at same time with A), it will be seen that these gentlemen signed as a committee of the Boston and Lowell and Nashua and Lowell Railroad Companies (record, p. 143); it also appears from Abbott's deposition that neither he nor Stark were directors in this defendant corporation. For these reasons, we submit that no lawful committee of the directors of the Nashua and Lowell Railroad Company was appointed, and that this defendant is not bound by the action of the gentlemen named; relying upon the maxim of law "*delegatus non delegare potest*" to sustain this position.

The plaintiff's counsel undertakes to reply to this denial of defendant by stating (brief, p. 25) it as a fact set forth in

defendant's answer, that defendant ratified and acquiesced in the contract (A), "and made its payments to the sinking fund."

Such a statement is easily made, and as easily denied. The only statement in defendant's answer about payments to the sinking fund is in these words: "And this defendant is informed and believes, and therefor avers, that there was paid to the trustees of said sinking fund, . . . by the Boston and Lowell Railroad Corporation, acting for itself, and for this defendant, a much larger sum than was due and owing from either or both of them to said sinking fund, . . . and this defendant denies that any sum whatever is due and owing from it to the plaintiff . . . if it shall receive the benefit of all sums contributed by its copartner, the Boston and Lowell Railroad Company as aforesaid." But this statement and all other statements in the defendant's answer were made expressly subject to the objection, reserved by the defendant in terms, that it never lawfully became a party to contract A, or bound thereby in any way.

See defendant's answer, p. 1, twenty-third line.
Record, p. 14 bottom, + p. 15 top

F. A. BROOKS,
Solicitor for Defendant.

112-311

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No. 1,009.

Supreme Court of the United States.

October Term, 1884.

OGDENSBURG AND LAKE CHAMPLAIN RAILROAD CO.

vs.

NASHUA AND LOWELL RAILROAD COMPANY.

Reply of Plaintiff to the Brief of the Defendant.

The fourteen first pages of defendant's Brief purport to be confined to the presentation of its view of the facts; but we think that in the subsequent portion of it, which assumes to deal with questions of law, there are averments of fact on which defendant's legal propositions rest which are misconceived or erroneous; so that it will be proper to advert to each of defendant's material suggestions in the order of their occurrence, except where the same are repeated or scattered.

1st. The early part of defendant's Brief seems designed to present the question, whether the lease (Exhibit A, Record p. 114) has the legal characteristics of a lease; and, farther, if it has, then that not only the legal authority to make such lease is wanting, but that the parties were at the time conscious of it.

Now, the lease was one to which the defendant was no party. Nothing in the contract, on which the bill is founded, rests on its validity. It is put in evidence merely to aid in the construction of that contract, and to show that plaintiff had no interest therein. Its legal validity is not put in issue by the answer, and the "farther legislation," which defendant relies on as indicating a consciousness that it had no legal validity, is the provision for farther legislation "to see that a *more perfect union* may be made, if it shall be found desirable," and thus hardly discloses a dread of the invalidity of the lease.

2d. There follows a scattered array of supposed facts (pp. 4, 5, 12, and 7), which, in defendant's view, show that notwithstanding the plaintiff's road was leased for twenty years, when it agreed, if necessary, to make its advance of $600,000 to carry out this enterprise (in which enterprise it is clear that it had no pecuniary interest, and from which it could derive no pecuniary profit), yet it had an interest of a character which might naturally induce it to make the loan, and to put that loan at the risk of the adventure.

The contention on page 7 of the Brief is, that there was no risk to plaintiff in making the loan, because of the improbability that the boat property would be worth less than it cost, and that the gross receipts would prove inadequate. This contention, we think, may be left to the Court without comment.

The contention on pages 4, 5, and 12, is, that the circumstances which coerced plaintiff to consent to make the large advance was the fear that its lessees would, if the boats were withdrawn, be unable to pay their rent. The support of this view is derived from the testimony of Pratt, a former ~~vice~~-president of the plaintiff, who failed of re-election. If it were material, an analysis of that testimony would be of interest. Its absurdity is shown by the declaration (Int. 40, Record p. 113) that, with an unexpired lease of 19 years, — at the end of which term only could a connection with the boats be of importance to the plaintiff, — yet "it would have been wiser and better for the Ogdensburg Road to have contributed $600,000 *outright* than to have broken the contract with the Northern Transportation Company." If Pratt's testimony were entirely reliable, it would doubtless show a *motive* (not a consideration) for plaintiff's submitting to the exaction. But wrung from it, as that assent was, it would also tend to show that some covenant of the parties for whose benefit the advance was to be made, protecting the plaintiff from the risk of the adventure, would have been almost necessarily required by the plaintiff. That it was in fact so required or offered is shown in distinct terms in the somewhat minatory letter of defendant's counsel, written to induce the plaintiffs to yield, which assumes it to be "the duty [of plaintiff] *to issue its bonds upon proper security*" (Record, p. 112).

It is perhaps immaterial to consider how weighty were the facts which overcame plaintiff's great reluctance to embark in this matter. Dread of loss of rent by the refusal of the lessees to pay the same could hardly have been the principal motive of plaintiff, since that rent was secured by the covenants of a wholly solvent company, — namely, the

Vermont and Canda,—and by the covenant of the receivers of the Vermont Central, who must be presumed to have acted in making that covenant under the orders of the Court, which thus would give a prior lien upon the property to secure the performance of the covenants. Probably the dread of litigation with their lessees, in whose hands were not only plaintiff's road, but its whole property (see Contract and Lease, Record, p. 14), was the prevailing consideration in the view of the plaintiff. The suggestion in defendant's Brief, that the letter of defendant's counsel intended to express to the plaintiff the opinion that the Twelfth Article of the lease (Record, p. 20) made it obligatory on plaintiff to issue its bonds, can have no foundation, and is inconsistent with the learning and ability of counsel. The issue of bonds under that Twelfth Section is in terms confined to the case "of a large increase of the business of the Ogdensburg Road," and does not apply to the case in which it should be requisite to prevent the steamers from being diverted to another road.

3d. The next suggestion, rather faintly put on page 7, is as follows: "It also contains the agreement of the Northern Transportation Company, as party of the first part, that the boats should be maintained or kept in the line of the Ogdensburg Company, and it is this agreement of the Northern Transportation Company on which all the other provisions of the contract seemed to be based."

The effect of this contention is doubtless intended to be, that defendant's covenant to contribute to the sinking fund during the term, according to the provisions of Article 5, is to be construed to be dependent on the compliance of the Transportation Company with this covenant.

Now, it is clear from the terms of the contract, if carried into effect, that *the parties of the third part, through their trustees, were to be thenceforth the Transportation Company.* By contract with Chamberlain (Record, p. 17), executed, as defendants declare, contemporaneously with the contract on which the bill is founded (defendant's Brief, p. 6), Chamberlain was to sell to the trustees of the third parties 5,500 out of 8,500 shares, constituting the capital stock of the Transportation Company; and thus, if the contract went into effect, the control of the corporation would be with the third parties. That contract farther provides that the purchase-money of the shares — 1,000 of which were at the time held as collateral by the Boston & Lowell and Concord & Northern Railroad Companies — was to be applied to discharge all

the debts of the corporation, except $4,000 first-mortgage bonds, which bonds, it will be remembered, the third parties were also to purchase under the sinking-fund provision. Chamberlain was to remain in the management of the boats, at a salary of $10,000 per annum, to the 1st of January, 1872. This contract, therefore, contemplated that the third parties, through their trustees, should be and constitute the Transportation Company. To say that the covenants of the third parties were understood by plaintiff or by themselves, as dependent on the performance by the Transportation Company of its covenant, would seemingly be absurd. The covenant of the Transportation Company was in fact and in effect the covenant of the third parties themselves.

As suggested in the opening Brief, plaintiff's advances were in terms limited by a condition that the same should be necessary "to the regular and efficient running of said steamers," which regularity and efficiency, as shown by the preliminary article, was to be effected by obtaining control of the stock. When that object could be accomplished, and thus the third parties become the real owners of the Transportation Company, was plaintiff's advance to be made.

4th. The next position of the defendant is, that by the instrument dated March 17, 1877 (Record, p. 63), not only are the Vermont and Canada and the Central Vermont Railroad Companies and their trustees and managers released, but that the effect of such release is to discharge the defendant.

This proposition is twice discussed in defendant's Brief; namely, on pages 10 and 11, and again on pages 25 to 30, inclusive. Plaintiff's view, both as to the form and effect of this instrument, is stated in its opening Brief, pages 30 and 31. So far as substance is concerned, it contends, as was declared by the Circuit Court, that the covenants of the third parties were several. If so, the release of one of them does not discharge the other.

The entire sum of defendant's contention (which admits, for the purpose of the argument, that the covenants of the third parties are several) is, that the release of one of those parties precludes all right of recovery against the others. It is thus stated on page 29 of defendant's Brief.

"We say the plaintiff's counsel assumes, contrary to fact, that the "plaintiff, under Contract A, was and is the only party interested in "or entitled to the benefit of the sinking-fund payments or of the fund "itself. If this were so, it might perhaps be true that the plaintiff

"could discharge this claim as against some of the third parties and "reserve it as to others. But such is not the case. The parties of the "third part (by Article 5) agreed with each other (though not directly "with plaintiff, except for interest) that they would contribute to and "raise a sinking fund sufficient to reimburse plaintiff's advances of "$600,000 (if made), and also sufficient to purchase the bonds secured "by mortgage on the boats of $400,000.

"It seems to us that these third parties did thereby in legal effect "also agree with each other that they, and each of them, would do "their part towards raising the entire amount required by the contract; "viz., $1,000,000, without which there would necessarily be a deficiency "or failure to pay for the property to be purchased by them all on "joint account and jointly owned.

"If we are correct in this position, it must follow (we think) "that the act of the plaintiff in releasing the trustees and managers "from all contributory liability, not only to the $600,000 fund, but to "the $400,000, was such a departure by the plaintiff from the terms "of the contract that the plaintiff at least cannot now be allowed to "enforce this contributory liability as against the other third parties "not included in the release. The plaintiff should not be allowed to "repudiate the contract in some of its bearings and enforce it as to "others at the same time."

Now, it is doubtless true that the covenants of the third parties to contribute to the sinking fund in several proportions, and that such contributions should never be less than sufficient for the purposes of that fund, *are several covenants between themselves as well as with the plaintiff*, and that each of the third parties has an interest that the others should perform their several covenants. This being so, while the contract remained executory,—not broken and abandoned,— what would be the effect of a release by plaintiff absolving one of the third parties from making any or all of the semi-annual payments, and whether the plaintiff would not thereby have broken the contract and lost all remedy under it, need not be discussed. One thing is clear, that such act would not have released the party thus discharged, from its liability to the other third parties for any breach of its covenants with them, if such breach existed, or unless all breaches common to them all were waived by an abandonment of the contract.

But the case to be dealt with is one where all the other parties have broken their contracts with the plaintiff, and where those covenants have remained broken and the project abandoned for years.

Nothing remained to the plaintiff under such circumstances but suit upon the broken engagements. How can it be claimed by any of the third parties that a compromise by plaintiff, under such circumstances, with one of them, instead of a suit, has impaired the right of each of them to redress any breach of covenants of the other parties with them, if such breach could be shown?

The history of this instrument is apparent on its face. After long-continued breach of a covenant to pay plaintiff its rent, suit was brought by it against the lessees to get the possession of its road, and a receiver appointed in October, 1876. Its rolling-stock was still retained by the lessees. By the compromise contained in the instrument, the lessees agreed that the possession of the road should be restored, and the rolling-stock redelivered, and the lease be cancelled upon the payment by the plaintiff to the lessee of $50,000, claimed to have been expended by them in improvements of the road.

5th. There follows in defendant's Brief, p. 30, a suggestion, by way of defence, which seemingly is in substance this: By the agreement of February 20, 1870 (Record, p. 122), between the third parties to the contract of 1871, annexed to the Bill (to the former, of which contracts the plaintiff was no party), the parties who were plaintiff's lessees agreed with all the other third parties that they would not modify or abrogate the lease without the consent of those other parties (Article 8, Record, p. 124).

Defendant's contention is, that, by the terms of the settlement of March 17, 1877, hereinbefore referred to, the lease, as averred, "being *held at that time*" for the joint use and benefit of all the third parties to the contract, annexed to the Bill, was cancelled without the consent of the other third parties; and, further, that the trustees and managers of the Vermont Central and the Vermont & Canada Railroads by the terms of the settlement "not only got themselves released from the "boat contract, but also got the sum of $50,000 of plaintiff's money *by* "*way of consideration for the violation of their agreement* not to sur-"render or abrogate the lease." This the defendant declares to be a fraud upon it and the other third parties to the contract of February 20, 1870, in which fraud it is alleged plaintiff participated, and ought now to account to the defendant for its share of the $50,000.

It would seem that, in presenting this contention, it did not occur to defendant that to the contract thus alleged to have been violated the plaintiff was not a party, — that the lease, the surrender of which

is defendant's complaint, was not "at that time" held for the joint and equal benefit of the third parties, but had been broken and abandoned by those third parties for years; and, it is submitted also, that the defendant must have hastily read the settlement, when it avers that the $50,000 (therein expressly declared to be in payment of improvements made on plaintiff's road) was a payment in consideration of which the release from the boat contract was obtained.

6th. Under the head of (Law 1) pages 14 to 17, inclusive, of defendant's Brief, there is embraced two contentions, namely, that the plaintiff's advances were not made for and in behalf of the third parties, as is attempted to be shown by plaintiff's Brief, pages 4 and 5; and, farther, that if they were thus made, plaintiff's claim is, by the New York Statute, void for usury. In support of the first of these contentions it is asserted, "that plaintiff's money or bonds never went into "the hands of the third parties;" that they "never applied to plain- "tiffs for any money by way of loan or otherwise;" that plaintiff's "advances were not made in the form of money;" that they were "not paid to the parties of the third part;" that there "was no "direct promise of repayment of the same, either to the plaintiffs or "any one else." This contention plaintiff cheerfully leaves without any other reply save that contained in its original Brief, pp. 4 and 5.

As to the defence of usury, it is sufficient to say that it is not set up by defendant's answer, and thus is not in issue. It may be added, that, if it were true that this contract was a New York contract, it is believed that by the Statutes of New York no such defence is open to any corporation.

7th. The defendant's next contention, on pp. 17 to 24 of its Brief, is confined to what it deems to be the true construction of Article 5 of the contract annexed to the Bill (Record, p. 9).

The whole scope of that Article, it will be seen, is confined to the contingency that plaintiff shall be called on to make its advance of $600,000, in which event the third parties are to pay directly to plaintiff the interest on its loan, and a sinking fund is to be formed to secure the repayment of the principal, partly in two years, and the remainder on or before the expiration of the nineteen years. The final clause of this article, in relation to that sinking fund, is as follows: "*In no* "*case* shall payments to the sinking fund be less than amounts which, "invested at six per cent. per annum, will produce the sum to be paid "out of such sinking fund."

Passing by defendant's assertion that the argument of plaintiff requires the sinking-fund payments to be continued "though all the "other parties, first and second, should have abandoned the enterprise "as hopeless," instead of claiming compensation for violation of agreement,— an absurdity which, we hope, is not to be found in plaintiff's Brief, — the contentions of defendant are substantially as follows: —

That the sole meaning and significance of the final clause of Article 5 is "to determine *at what rate of interest* the sinking-fund "calculation should be made up," and "thus furnish the trustees with "a rate of computation." That, except for that clause, "the trustees "would have had no guide to enable them to fix upon the amount of "semi-annual payments to be required of the parties of the third part, "and without this provision it would have been impossible for the "parties of the third part to know whether the sums named by the "trustees were correct or not."

It is important to note that this construction of the clause is a distinct admission of plaintiff's important contention in its opening Brief (pp. 12–16), namely, that the sums to be semi-annually paid by the several third parties were to be *fixed sums*, and not sums depending upon the fluctuating and uncertain gross receipts of each of all those third parties during every six months, and that in no other way could the sinking fund be made up. To arrive at these fixed sums we admit that it was, as defendants assert, necessary that the rate of interest at which the sinking fund contribution must be made up should be prescribed. But the defendant's suggestion that this matter of interest was its sole object is wholly unwarranted. We submit that if the clause had contained nothing more than a declaration that a sinking fund to secure plaintiff's advances should be created and made up of sums fixed and certain, payable at definite periods, it would necessarily import an absolute covenant that those sums should be paid at the times prescribed, irrespective of gross receipts. But the whole clause taken together, in plaintiff's view, settles this conclusively. It will be perceived that, by the earliest clause of this Article 5, it is declared that the payments to the sinking fund shall be from "the semi-annual payments reserved from gross receipts as aforesaid." It is next to be noticed that the shares of those semi-annual payments to be made by each party were previously, by Article 2, to be fixed and apportioned by their relative gross receipts. In view of these preceding provisions, when the parties were, under Article 5, arranging for a fixed absolute sum to make up a sinking fund, it was deemed proper, in order to

exclude the possible inference that the fixed sums to be paid to that sinking fund by the respective parties of the second part were to be contingent, and depend upon each six months' gross receipts, to make a distinct declaration, that in *no case* shall payments to the sinking fund be *less* than amounts which, invested at six per cent., will produce the sum to be paid out of such sinking fund.

We add, that no other construction of the words, "in no case," has hitherto been suggested by Court or counsel, or is plaintiff's view possible. The defendant's suggestion, that the words "*be less*" were meant to protect the parties of the third part from their paying *more*, or too much, must stand upon its merits.

The defendant's remark on page 20 of its Brief, that this making absolute provision for the repayment of plaintiff's advances or capital on or before the expiration of the nineteen years, and leaving the small sum payable for interest thereon dependent upon the whole gross receipts of all the third parties, creates a repugnancy, does not seem to plaintiff to be weighty. Nor is it unimportant to note the error of statement on page 20 of defendant's Brief, that the original scheme under Article 3 embraced the purchase of the $400,000 bonds.

8th. To the contention in defendant's Brief (p. 24), that "after "the boats had ceased to run, and the gross receipts had wholly failed, "no means were then left of ascertaining the proportions in which the "parties of the third part were bound to contribute to the sinking "fund," and, by reason thereof, plaintiff's suit must fail "because the "contract itself is wanting in the element of certainty,"—we reply: That this admits the liability of defendant, but declares plaintiff to be remediless, since the contract points out no mode of determining the relative contributions of the third parties to plaintiff's reimbursements. This would be a strange attitude of any cause. But, as will be pointed out hereafter, under the 12th head of this reply, the parties themselves in the distribution of their losses under the boat contract, up to July 1, 1873, found no difficulty in making the apportionment.

9th. The next ground of defendant (Brief, pp. 24 and 25) is that plaintiff having by its stipulation in the Circuit Court waived the claim, to which that Court held it was entitled, to compensation to the extent of all the gross receipts of all the third parties, it thereby waived all claim against the defendant for or on account of those receipts, and that thereby the jurisdiction of a Court of Equity was lost, and plaintiff

must proceed at law (see stipulation, Record, p. 182). The defendant's proposition is this: "So long as plaintiff sought by its bill in the case "to recover the sum dependent on the gross receipts realized by those "defendants, and required an account for this purpose, the plaintiff "might properly sue in a Court of Equity; but this ground of recovery "has been abandoned in this case, and so jurisdiction in equity is no "longer claimable or necessary for an accounting."

Now, plaintiff's bill is expressly framed to obtain a discovery, and also to obtain an account from the defendant, by the aid of which, and by proof of the gross receipts of the other third parties up to the time of the abandonment of the enterprise, the measure of plaintiff's compensation for breach of the agreement by defendants and by those third parties may be had.

When, therefore, the whole contract was abandoned, and the covenants with the plaintiffs finally and for ever broken, unless plaintiff is remediless, a Court of Equity, since there is no longer the means of ascertaining what the relative future gross receipts of each of the third parties would have been down to the end of the nineteen years, will, we submit, order an account to be taken of what were those relative gross receipts up to the date when the business was broken up, and, as against parties who have broken their engagements, will assume that the future relative gross receipts after the breach would have been like or equal to those of the past. If it should be found by a Master that such an account could only be approximately made fromthe unwillingness of any of the third parties to furnish the materials for such account (of which they alone have the control), or by reason of lapse of time, probably the Court will adopt that approximation; if not, is plaintiff's bill, of which the Court had clearly jurisdiction, to be dismissed in consequence of the fact that such an account cannot be accurately stated? Clearly, defendant must for the above purpose disclose its gross receipts.

10th. The next contention of defendant's Brief has relation to the effect of the instrument of compromise of ~~August~~ March, 1877, between the plaintiff and the managers and receivers of the Vermont Central and the Vermont & Canada Railroads (Record, p. 63), which contains the alleged release of one of the third parties. This contention has been already dealt with by plaintiff, on page 4 of its reply.

But there follows the argument of the defendant upon this point, the farther contention that the contract was, so far as the third parties thereto were concerned, *ultra vires*.

It is to be noted that defendant does not attempt to answer the contention of plaintiff in its original Brief (p. 26 *et seq.*), nor the authority there cited (which declares that the recovery of money lent to the corporation to carry on a contract, which, as to such corporation, is *ultra vires*, may be recovered by the lender), except by saying that it is not true that the loan was made to the defendants. On this point plaintiff refers to its opening Brief (p. 4). Defendant's argument rests upon the ground that, although plaintiff's advances were made to the trustees, who were to apply the same for the sole benefit of the third parties, with the promise of those third parties to reimburse plaintiff, yet such advances were not made to the defendants. This suggestion must be left to stand at its true value.

As to the defendant's contention, that between those third parties the contract was *ultra vires*, an attempt is made by the defendant to show, by the oral testimony of Mr. J. Gregory Smith, that, at the time of making the contract, the trustees and managers of the Vermont Central and the Vermont & Canada Railroads were advised by counsel that neither of those roads had a right to appropriate funds to the purchase of stock in an outside enterprise (Interrogatory 14, Record, p. 45). Yet, under this advice, they executed the contract in question, clearly on the ground that the traffic contract might, as one of its terms, involve the purchase of some of the shares of one of the contracting parties. It is further attempted, by evidence of Pratt, plaintiff's former president (Interrogatory 25, Record, p. 110), to show that "our [plaintiff's] counsel told us that the contract itself created no legal "obligatino in their opinion on either party,"—a most curious statement in the face of which this same corporation and president advanced $600,000 under a contract which counsel advised created no legal obligation for the repayment of the same.

Now, to the introduction of such testimony plaintiff objected, as appears by the Record, and it still objects that the legality or the illegality of the contract depends on its terms. If plaintiff, on its part, had attempted to show by oral testimony that it was advised by counsel that the contract was not *ultra vires*, but perfectly legal, we think the defendant would and could have successfully objected.

The remaining contention of the defendant as to the doctrine of *ultra vires between the parties* themselves is, that the contract under the circumstances was not an executed contract within the meaning of the rule which excepts from the doctrine of *ultra vires* contracts so completed and executed that nothing remains but to adjust the rights and

remedies between the parties thereto, resulting from their labors and expenditures in completing the same. On this point plaintiff is content to rest upon its views stated on page 26 of its original Brief.

11th. To the defendant's proposition (Brief, pp. 34, 35), that it was not competent for directors to enter into such a contract, even if it were competent for the corporation to do so, we reply: That the corporation ratified the action of its directors by the payment to the sinking fund of $3,295.13, and charged the same to the trustees of the sinking fund in their books. This is shown by defendant's answer, (Record, pp. 23-31).

12th. But the answer of defendant, thus referred to, is worthy of reproduction. It is as follows (Record, pp. 27): "This defendant says "it produces and annexes hereto an extract from its ledger, marked C, "of the entry supposed to relate to the inquiry. From these entries and "those in the cash-book it appears that the item of $13,788.55 was for "31% of losses *to July* 1, 1873, on account of Northern Transportation "Company's business, as shown by joint traffic book in the possession "of the Boston & Lowell Railroad Company, and that the item of "$3,295.13 was 31% of the amount paid over by the joint roads (Boston "& Lowell and Nashua & Lowell) to October 1, 1874, to the trustees of "the sinking fund. In both cases these sums are equal to 31% of "amounts paid out by the Boston & Lowell R. R., as this defendant "understands." (See entries on defendant's books, Record, p. 31.)

We have before referred to this admission in another connection. But its gravest importance is, that it shows conclusively that the parties of the third part, instead of acting on the construction that repayment of plaintiff's advances were to be limited to the whole or a portion of their gross receipts, did actually pay to the trustees of the sinking fund, under the contract, a sum greatly in excess of the whole of their gross earnings, of which payment the part belonging to the Boston & Lowell and the defendant company (which was managed by the Boston & Lowell) was $13,788.55, of which the defendant's part was $3,925.13 (see copy of defendant's books, Exhibit C, Record, p. 31). And it further shows that there was found by the third parties in the contract a rule of apportionment, between themselves, of losses or of payments not reimbursed to them by gross receipts under the boat contract, which is clearly to be the rule of apportionment to be applied to plaintiff's reimbursement.

13th.- As to the final contention of defendant's Brief (p. 34), that it never became a party to the contract, on the ground that the committee who executed it were never lawfully appointed, plaintiff must be content to refer to Mr. Abbott's deposition (Record, p. 27), and to the fact already shown, that defendant ratified the contract, and made payments under it.

S. BARTLETT,

For plaintiff.